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NO. 80-1822

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

HAROLD ANCLE THORNBERRY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

W. ROBERT LOTZ, JR.
211 East Fourth Street
P.O. Box 1078
Covington, Kentucky 41012
606-261-5777

Attorney for Petitioner

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

QUESTIONS PRESENTED FOR REVIEW

A. MAY A FEDERAL PROSECUTOR CALL WITNESSES TO THE STAND WHEN IT IS KNOWN IN ADVANCE THAT THOSE WITNESSES WOULD VALIDLY INVOKE THEIR FIFTH AMENDMENT PRIVILEGE TO ALL QUESTIONS ASKED AND THE GOVERNMENT'S SOLE PURPOSE IN CALLING SUCH WITNESSES IS TO INFORM THE JURY OF THE FACT OF THEIR CLAIM OF PRIVILEGE?

B. MAY A FEDERAL PROSECUTOR THEN COMMENT UPON THOSE WITNESSES' REFUSALS TO TESTIFY IN HIS CLOSING ARGUMENT AND SUGGEST THAT INFERENCES SUPPORTING AN ELEMENT OF HIS CASE ARISE FROM THEIR REFUSAL TO TESTIFY?

PARTIES TO THE PROCEEDINGS IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF KENTUCKY

PLAINTIFF: UNITED STATES OF AMERICA

DEFENDANTS: HAROLD ANCLE THORNBERRY
HARRY NORMAN SEITER
HOWARD NEWTON DONNELLY
BROWN MARTIN NOEL
SANFORD ALLEN RUE
FRED MESSER
RODNEY CHALK
EDWARD SODEN

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Judgment and Commitment Order Criminal Action No. 78-26 filed in the United States District Court for the Eastern District of Kentucky on November 20, 1978.

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Order of the United States Court of Appeals for the Sixth Circuit, dated April 1, 1981.

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NO. ————

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

HAROLD ANCLE THORNBERRY,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Harold Ancle Thornberry, by his Attorney, prays that a Writ of Certiorari issue to review the Judgments of the United States Court of Appeals for the Sixth Circuit entered in the above case on February 24, 1981, and April 1, 1981.

OPINIONS BELOW

No written Opinion regarding the issues in this case was filed or published by the United States District Court for the Eastern District of Kentucky. The oral ruling of the Court is at pages 17a-19a of this Appendix. The Opinion of the Sixth Circuit Court of Appeals, which affirmed the Judgment of the District Court, is at Pages 3a-7a of this Appendix and has not been officially reported to date. The Order of the Sixth Circuit Court of Appeals denying

a timely filed Petition for Rehearing was entered April 1, 1981, which Order may be found at Page 8a of this Appendix.

JURISDICTIONAL STATEMENT

The date of the Judgment of the Court of Appeals for the Sixth Circuit and the date of its entry is February 24, 1981, (App. 3a).

An Order of the Court of Appeals denying a timely Petition for Rehearing was entered April 1, 1981 (App. 8a).

Jurisdiction of this Court is invoked under 28 USC § 1254 (1).

CONSTITUTIONAL PROVISIONS

AMENDMENT FIVE:

> "No person shall . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law."

AMENDMENT SIX:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."

UNITED STATES SUPREME COURT STANDARDS

STANDARD 513(a):

> *"Comment Or Inference Not Permitted.* The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not proper subject of comment by judge or counsel. No inference may be drawn therefrom."

STANDARD 513(b):

> *"Claiming Privilege Without Knowledge Of Jury.* — In jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury."

STATEMENT OF THE CASE

On May 3, 1978, Harold Thornberry and seven Co-Defendants were first indicted in the Eastern District of Kentucky. A three count superseding Indictment was filed on May 24, 1978. Count One charged Thornberry and the others with violating Title 18, Section 371, United States Code, "Conspiracy to commit an offense against the United States." Count Two charged Thornberry and six Co-Defendants with violating Title 18, Section 1955, United States Code, "Prohibition of illegal gambling businesses." Count Three charged Thornberry and three Co-Defendants with violating Title 18, Section 1511, United States Code, "Obstruction of State or Local Law Enforcement." As the result of a Motion to Elect filed by the Defendants, the United States elected to proceed under Count Three only for its first trial.

The Indictment, in Count Three, charged Harold Thornberry, Howard Donnelly, and Brown Noel with operating or managing an illegal poker game at 616 Washington Street in Covington, Kentucky. That gambling business allegedly involved five or more persons, including Sanford Rue, Fred Messer, Rodney Chalk, and Edward Soden, four Co-Defendants who were named only in the first two counts. It also allegedly involved substantially continuous operation for more than thirty days and had gross revenue of $2,000.00 in any single day. It was charged that Thornberry, Donnelly and Noel conspired with Harry Seit-

er, a Covington policeman, to keep the gambling business secret from other local and state law enforcement personnel and to prevent enforcement of Kentucky gambling laws.

Trial on Count Three was begun on September 6, 1978, before a Jury in Covington, Kentucky, but ended in mistrial. Retrial on Count Three took place in London, Kentucky, before the Honorable Eugene Siler, District Court Judge, beginning on October 16, 1978.

The Government presented players who testified that from February, 1977, until March 23, 1978, a regular poker game was conducted in an apartment at 616 Washington Street. This apartment building was owned by Harold Thornberry. Thornberry had rented it to Brown Noel's wife in January, 1977, for $150.00 per month. The windows of the apartment were boarded over and the door had a peephole. Poker was played with a $2.00 opener, and a $2.00 limit on raises.

The game would have a dealer who would not play when dealing. The dealer would cut quarters from the pots and place them in a cigar box. Witnesses identified Edward Soden, Rodney Chalk, Fred Messer, and Sanford Rue, as having been dealers. Brown Noel and Howard Donnelly answered the door and telephone, served food and beverages to the players, and received the contents of the cigar box. Neither Harold Thornberry nor Harry Seiter were identified as having ever been present at the game. Howard Donnelly told one player that the game was "protected."

Noel and Donnelly testified that the money cut was only for rent, utilities, dealers, food and beverages, and asserted that the game was legal under a Kentucky Attorney General's Opinion. There was evidence that from March of

1977, various police agencies including the Covington Police, the Kentucky State Police, and the F.B.I. had all been aware of this game, but that there was confusion over the applicability of Kentucky gambling statutes to it.

The Government presented testimony that Howard Donnelly had once been seen giving money to Harold Thornberry. They also proved that after the F.B.I. had searched 616 Washington and had served the Warrant return on Thornberry, Harry Seiter had visited him to inquire into what the F.B.I. had found.

The case against Harold Thornberry also rested upon some conversations he had in March of 1978, which were surrepticiously recorded by a paid undercover "consultant" who had befriended Thornberry. In them, Thornberry bragged that he had the Police Department in his pocket, that he had paid for promotions of unnamed Covington Police and Fire Officers, that he had gotten the City Commissioners elected, that he had gotten Harry Seiter promoted and would have him made Police Chief, and that Donnelly and Noel were paying him $450.00 in addition to his rent which he used to pay off certain unidentified City Commissioners and policemen. Harold Thornberry testified in his defense and denied the truth of these statements. He produced business records and testimony to the effect that, in reality, he had received only his rent for the premises.

As part of their case in chief, the United States announced that they intended to call the four alleged "dealers", Edward Soden, Fred Messer, Sanford Rue, and Rodney Chalk, as witnesses. All four men were still under indictment at that time. Outside of the Jury's presence, their Attorney informed the Court that they all would, if called, assert their Fifth Amendment privilege to remain silent

(App. 10a). The United States Attorney informed the Court that he was aware of that fact but was entitled to call them so as to inform the Jury of their assertions of privilege (App. 10a). Defense counsel objected to calling the four men for the sole purpose of having them invoke their privilege before the Jury and requested voir dire (App. 11a). Outside of the Jury's presence, Fred Messer was briefly interrogated by the Prosecutor and indicated he would "take the Fifth" to all questions asked (App. 12a-13a). The United States Attorney then stipulated that Allen Rue, Ed Soden, and Rodney Chalk would likewise, if called, assert their Fifth Amendment privilege to all questions asked (App. 13a). The Prosecutor made no challenge to the validity of their assertions of privilege. The Government asserted that they had a duty, under Sixth Circuit case law, to call these witnesses and to then have them invoke their privilege before the Jury. (App. 16a). The Trial Court, recognizing a direct conflict of case law between the Federal Circuits, ruled that Sixth Circuit case law permitted the Government to call those witnesses (App. 17a-19a). Over objection, all four Co-Defendants were called and invoked their privilege before the Jury (App. 27a, 30a-33a). An admonition was given (App. 29a-30a) Defendants' Motions for mistrial were overruled (App. 34a).

In closing argument, the Prosecutor informed the Jury that the "5 person requirement" of an illegal gambling business can be satisfied by "dealers," among others (App. 35a). The Prosecutor also commented upon the refusal of the four alleged "dealers" to testify, stating:

> "You get to the dealers. Now the United States brought these dealers in here and put them on the stand. But we didn't get anything out of them. And

you are not to infer, you know, that that is anything against the Defendants. But we wanted to put all the people on that we could that were at that game, and to have them tell you what was going on. But the testimony of the players was that these dealers definitely cut the pot, and the reason they were cutting the pot, according to the players, was the more you play, the faster you play, in a half-hour shift, the more money goes into that box. And, of course, the Defendants propounded the theory that, well, it was just to keep all the money straight and so forth and so on. But that's another factual dispute you will have to decide . . . So I think it's pretty obvious, ladies and gentlemen, that this was an illegal game." (App. 35a-36a)

On November 17, 1978, the Jury returned a verdict of guilty against Harold Thornberry, Harry Seiter, Brown Noel and Howard Donnelly. On November 20, 1978, Harold Thornberry was sentenced to five years imprisonment. On February 27, 1978, the first two Counts of the Indictment were dismissed upon request of the United States. Thornberry timely appealed his Judgment and sentence on Count Three to the Sixth Circuit Court of Appeals on the grounds, among others, that it was improper for the Government to call witnesses for the sole purpose of having them invoke their Fifth Amendment privilege before the Jury and that it was improper for the Prosecutor to argue that inferences in his favor arose from those assertions of privilege. A panel of that Court ruled, pursuant to established Sixth Circuit case law, that when the Government has the following: (1) an honest belief that a witness has information which is non-cumulative and is pertinent to the issues in the case; and (2) that information is admissible under applicable rules of evidence (if no privilege is claimed), then the Government may call wit-

nesses for the sole purpose of informing the Jury of the fact they are asserting their privilege. They also ruled that the Prosecutor's closing argument was not "so egregious as to render the entire trial fundamentally unfair." (App. 6a)

Harold Thornberry now seeks certiorari to review these decisions of a panel of the Sixth Circuit Court of Appeals.

REASONS FOR GRANTING CERTIORARI

CERTIORARI SHOULD BE GRANTED IN THIS CASE BECAUSE THE DECISION OF A FEDERAL QUESTION BY THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT IS IN CONFLICT WITH THE DECISIONS OF THIS COURT IN NAMET v. UNITED STATES, 373 U.S. 179 (1963); DOUGLAS v. ALABAMA, 380 U.S. 415 (1965); GRIFFIN v. CALIFORNIA, 380 U.S. 609 (1965), CARTER v. KENTUCKY, (1981) NO. 80-5060, — U.S. —, 28 CrL 3093, SUPREME COURT STANDARD 513(a), (b), AND IS ALSO IN CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL ON THE SAME MATTER.

ARGUMENT

In *Namet* v. *United States,* 373 U.S. 179, 83 S.Ct. 1151, 10 L.Ed.2d 278 (1963), this Court articulated two principles on which a prosecution witness's invocation of the *Fifth Amendment* privilege before a Jury may constitute reversible error:

1. "Prosecutorial misconduct, when the Government makes a conscious and flagrant attempt to build

its case out of inferences arising from the use of the testimonial privilege" and

2. When "in the circumstances of a given case, inferences from a witness's refusal to answer added crucial weight to the prosecution's case in a form not subject to cross examination . . ." 373 U.S. at 186-87, 83 S.Ct. at 1155, 10 L.Ed.2d at 283-84.

In *Douglas* v. *Alabama,* 380 U.S. 415, 85 S. Ct. 1074, 13 L.Ed.2d 934 (1965), these principles were given constitutional significance under the Due Process Clause of the *Fifth Amendment* and the Confrontation Clause of the *Sixth Amendment* and were made applicable to the States under the *Fourteenth Amendment.* See 380 U.S. at 419-20, 85 S. Ct. 1074, citing *Namet.*

Namet involved a gambling tax prosecution in which a Federal prosecutor subpoenaed and then produced as witnesses at trial two co-defendants of Namet who had plead guilty earlier that day. Namet's counsel, who also represented both co-defendants, approached the Bench before the witnesses were called to inform the Court that he believed both witnesses were entitled to assert their *Fifth Amendment* privilege, despite their pleas. The Court reserved on the question of waiver of the privilege until the witnesses actually asserted it. When the first witness did, in fact, assert her privilege, the Prosecutor challenged it and the Court ruled that her plea had waived any privilege with respect to testimony about her own gambling activities and ordered her to answer questions on that subject. The Court also ruled that the privilege was available with respect to the witness's dealings with third parties. Joint counsel apparently acceded to the Court's decision once a means was established by which he could direct the witness when to assert the privilege. Under this arrangement, both co-defendants testified extensively to non-privileged

but material facts and, in the course of that testimony, successfully asserted their privilege before the Jury to a few of the questions asked. Defense counsel argued from portions of the witnesses' non-privileged testimony in his closing.

In light of this fact situation, this Court found no inference of prosecutorial misconduct since Namet's prosecutor apparently called both witnesses in the good faith belief that: (1) any assertion of privilege was challengeable under legal precedent which existed at that time; (2) both witnesses would testify to non-privileged facts which were a necessary part of his proof and did so testify, and (3) the Defendant's counsel failed to object on Namet's behalf but in many instances actually acquiesced in the procedure once the rights of the witnesses were secured. *Namet* (supra) 373 U.S. at 188-189, 10 L.Ed.2d at 284-285. This Court also failed to find that inferences from the witnesses' refusal to testify added critical weight to the prosecution's case against Namet in a form not subject to cross-examination since (1) all possible inferences also could permissibly be drawn from these witnesses' non-privileged testimony and had been well established by that testimony, and (2) the effect of those questions which provoked valid assertions of privilege was minimized by the witnesses' lengthy non-privileged testimony and apparently by the weight of other evidence of the Defendant's guilt. *Namet* (supra) 373 U.S. at 189, 10 L. Ed.2d at 285.

In *Douglas* v. *Alabama* (supra), 380 U.S. 415, this Court reversed a State conviction in which a prosecutor, after it became clear that a co-defendant/witness would invoke his privilege to remain silent to all questions, read that witness's previous confession while pausing repeatedly to ask the witness whether he had made the statement. Since portions of that confession implicated the Defendant on

trial, this Court held that the inferences from the witness's refusal to answer added critical weight to the prosecution's case in a form not subject to cross examination and thereby prejudiced Douglas under the second principle of *Namet*. *Douglas* v. *Alabama* (supra), 380 U.S. at 420, 13 L.Ed.2d at 938.

With the exception of the Sixth Circuit, the Federal Courts of Appeal have uniformly held it to be improper for either a prosecutor or defense counsel to intentionally call a witness when it is known in advance that the witness will assert a valid Fifth Amendment privilege to refuse to testify as to virtually all questions asked and the sole purpose of calling that witness is to impress upon the Jury the inferences arising from its assertion. *Bowles* v. *United States* (CADC en banc, 1970) 439 F.2d 536 at 541-542; *United States* v. *Reese*, (CADC, 1977) 561 F.2d 894 at 899-900; *Fletcher* v. *United States*, (CADC, 1964) 332 F.2d 724 at 726-727; *United States* v. *Johnson*, (CA1, 1973) 488 F.2d 1206 at 1211; *United States* v. *Maloney*, (CA2, 1959) 262 F.2d 535, cited with approval in *Namet* (supra); *United States* v. *Tucker*, (CA3, 1959) 267 F.2d 212 at 214, cited with approval in *Namet* (supra); *United States* v. *Beechum*, (CA5, 1978) 582 F.2d 898 at 909; *United States* v. *Ritz*, (CA5, 1977) 548 F.2d 510 at 519-520; *San Fratello* v. *United States*, (CA5, 1965) 340 F.2d 560, 565; *United States* v. *Harris*, (CA7, 1976) 542 F.2d 1283 at 1298; *United States* v. *King*, (CA8, 1972) 461 F.2d 53 at 57; *United States* v. *Roberts*, (CA9, 1974) 503 F.2d 598 at 600; *United States* v. *Marten* (CA10, 1975) 526 F.2d 485 at 487; *United States* v. *Coppolla* (CA10, 1973) 479 F.2d 1153.

The American Bar Association Project on Standards of Criminal Justice: *Standards Relating to the Prosecution* § 5.7 (c), reflect these cases in clearly stating:

> "It is unprofessional conduct for a prosecutor to call a witness who he knows will claim a valid privilege not to testify, for the purpose of impressing upon the jury the fact of the claim of privilege."

Similarly, *Supreme Court Standard 513(b)*, a standard having utility on the law of privileges to be applied in Federal Courts, reflects these cases by stating:

> "(b) *Claiming Privilege without knowledge of jury.* — In Jury cases, proceedings shall be conducted, to the extent practicable, so as to facilitate the making of claims of privilege without the knowledge of the jury."

See *Weinstein's Evidence*, Vol. 2 at 513-1 (1980).

The Sixth Circuit rule differs from all of the above authority in holding that a Federal prosecutor may call a witness whom he knows will assert a valid privilege under the Fifth Amendment to virtually all questions and may then force invocation of this privilege before the Jury if that prosecutor (1) believes the witness possesses information which would otherwise be relevant and admissible evidence; (2) asks relevant questions when forcing assertion of the privilege before the Jury, and (3) claims his case would be seriously prejudiced by a failure to offer that witness. *United States* v. *Compton*, 365 F.2d 1, (CA6, 1966) cert. denied, 385 U.S. 956; *United States* v. *Kilpatrick*, (CA6, 1973) 477 F.2d 357 at 360; *United States* v. *Vandetti*, (CA6, 1980) 623 F.2d 1144 at 1147.

Applying their rule to Harold Thornberry's case, the Sixth Circuit found no error or evidence of prosecutorial misconduct (App. 5a, 6a) even though the record revealed the following facts surrounding the prosecution's use of the witnesses, Soden, Chalk, Messer and Rue:

1) The prosecutor knew in advance that all four witnesses would assert their *Fifth Amendment*

privileges to all questions asked and stipulated to that fact as to three of these witnesses. The fourth witness had asserted his privilege and had indicated his intention to assert it to all questions in a hearing outside of the Jury's presence. (App. 10a-13a)

2) The Prosecutor never challenged the validity of the witnesses' assertion of privilege.

3) The Prosecutor never sought non-privileged testimony from any of these witnesses.

4) The Prosecutor had not obtained immunity for any of these witnesses under *18 U.S.C. § 6003*.

5) The Prosecutor's only expressed purpose in calling these witnesses was to have them invoke the privilege before the Jury, which he claimed was his "duty" under previous Sixth Circuit Opinions. (App. 16a)

6) The Prosecutor had, apparently, interviewed none of the witnesses, all of whom were Co-Defendants who were awaiting trial for conspiracy and the operation of an illegal gambling business under separate counts of the same Indictment. (App. 20a)

7) The entire procedure was strenuously and continuously objected to by defense counsel at Bench conferences and in a hearing outside the Jury's presence before any of these witnesses were called. (App. 9a, 10a, 11a, 14a, 16a, 17a, 19a, 20a, 21a, 22a, 23a, 26a, 28a, 33a)

8) In closing argument, the Prosecutor commented upon the assertion of privilege by these witnesses and argued that it supported inferences in the Government's favor by stating:

"You get to the dealers. Now the United States brought these dealers in here and put them on the

> stand. But we didn't get anything out of them. And you are not to infer, you know, that there is anything against the Defendants. But we wanted to put all the people on that we could that were at that game, and to have them tell you what was going on. But the testimony of the players was that these dealers definitely cut the pot, and the reason that they were cutting the pot, according to the players, was the more you play, the faster you play, in a half-hour shift, the more money goes into that box. And, of course, the Defendants propounded the theory that, well, it was just to keep all the money straight and so forth and so on. But that's another factual dispute you will have to decide . . . So I think it's pretty obvious, ladies and gentlemen, that this was an illegal game." (App. 35a, 36a).

In *Griffin* v. *California*, 380 U.S. 609 at 614, 85 S.Ct. 1229, 14 L.Ed.2d 106 (1965), this Court ruled that any prosecutorial comment regarding an assertion of the privilege against self-incrimination by a Defendant violates the Fifth Amendment to the Constitution. Recently, in *Carter* v. *Kentucky* (Dec'd March 9, 1981) No. 80-5060, 28 CrL 3093 — U.S. —, this Court further relied upon its decision in *Griffin* by holding that the Fifth Amendment privilege against self-incrimination requires a state trial judge, upon proper request, to give an instruction that will minimize the danger that the Jury will give evidentiary weight to the Defendant's failure to testify and stated:

> "The Constitution further guarantees that no adverse inferences are to be drawn from exercise of that [the Fifth Amendment] privilege." *Carter* v. *Kentucky*, — U.S. —, 28 CrL Rpt. 3098 (1981).

While this Court has never specifically ruled upon the issue of whether or not prosecutorial comment regarding the assertions of privilege by a witness may constitute reversible

error, it has promulgated Supreme Court Standard 513 (a), which states:

> *"a) Comment or inference not permitted.* — The claim of a privilege, whether in the present proceeding or upon a prior occasion, is not proper subject of comment by judge or counsel. No inference may be drawn therefrom."

See *Weinstein's Evidence,* Vol. 2 at 513-1 (1980).

In his argument to the Jury, this Federal Prosecutor was attempting to make the Jury draw the following inferences from the witnesses' assertions of privilege:

> 1) That the United States was in possession of information regarding those persons' testimony which was not presented to the Jury because of their refusal to testify;
>
> 2) That the Government called these witnesses because they would have testified adversely to the Defendants if the privilege had not been invoked; and
>
> 3) That the witnesses' fear of incrimination reflected acknowledgment that they had participated, as dealers, in an illegal gambling business.

Such adverse inferences cannot properly be drawn by either side from a witnesses' complete refusal to testify on the grounds of a valid privilege. See *United States* v. *Williams,* (CA8, 1972) 464 F.2d 927 at 930; *United States* v. *Maloney* (supra) 262 F.2d at 537; *United States* v. *Johnson* (supra) 488 F.2d 1211; *United States* v. *Atnip* (CA7, 1967) 374 F.2d 720 at 722. This prosecutor's closing argument reflected a conscious attempt to use such inferences to build his case upon a situation which he had intentionally created and which had no value as evidence in his case. Such conduct is in direct contravention of

this Court's decision in *United States* v. *Namet,* (supra) 373 U.S. at 186.

Certiorari is requested to review the use in this case of what has now become a regular and extremely unfair trial tactic of certain Federal prosecutors under the jurisdiction and supervision of the United States Court of Appeals for the Sixth Circuit.

CONCLUSION

For the reasons set forth above, a Writ of Certiorari should issue to review the Judgment and Opinion of the Sixth Circuit Court of Appeals.

Respectfully submitted,

COBB & OLDFIELD
BY: W. ROBERT LOTZ, JR.
P.O. Box 1078-211 E. 4th Street
Covington, Kentucky 41012
1-606-261-5777

Attorney for Petitioner

APPENDIX

EXHIBIT A

UNITED STATES DISTRICT COURT FOR
EASTERN DISTRICT OF KENTUCKY
COVINGTON

Docket No. 78-26

UNITED STATES OF AMERICA

vs.

HAROLD ANCLE THORNBERRY

JUDGMENT AND PROBATION/COMMITMENT ORDER

* * *

In the presence of the attorney for the government the defendant appeared in person on this date – November 20, 1978

* * *

X WITH COUNSEL – WILLIAM OLDFIELD

* * *

There being a verdict of X GUILTY AS TO COUNT 3.

Defendant has been convicted as charged of the offense of Conspiring to obstruct enforcement of criminal laws of State of Kentucky with intent to facilitate an illegal gambling business in violation of Title 18, Section 1511, United States Code.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that: The defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of

COUNT 3 – FIVE (5) YEARS IMPRISONMENT

A presentence report was submitted to the Court before imposition of sentence and copies of the report were furnished counsel pursuant to Rule 32, F.R.Cr.P.

* * *

/s/ EUGENE K. SILER, JR., JUDGE

* * *

EXHIBIT B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 78-5508, 78-5509, 78-5510, 78-5511, 80-5048

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HAROLD ANCLE THORNBERRY (78-5508, 80-5048),
HARRY NORMAN SEITER (78-5509, 80-5048),
HAROLD NEWTON DONNELLY (78-5510, 80-5048),
BROWN MARTIN NOEL (78-5511, 80-5048),

Defendants-Appellants.

ORDER

(Filed February 24, 1981)

BEFORE: LIVELY, BROWN and JONES, Circuit Judges.

Brown Martin Noel, Harold Newton Donnelly, Harold Ancle Thornberry, and Harry Norman Seiter appeal their convictions for conspiring to obstruct enforcement of criminal laws of the Commonwealth of Kentucky with intent to facilitate an illegal gambling business in violation of 18 U.S.C. § 1511.

From January 1977 until March 23, 1978, a nightly poker game was played at 616 Washington Street. The apartment

was owned by Thornberry and rented to Noel's wife. Many different people gambled in the game. The windows of the apartment were boarded over and the door had a peephole to examine the entrants. Poker was played with a two-dollar opener and a two-dollar limit on raises.

The game had a regular dealer who did not play in the game. Two or three dealers worked in shifts each evening. Noel or Brown answered the door and telephone and prepared food and beverages for the players. One player testified that Donnelly told him the game was protected and wouldn't get raided without his getting a warning.

During the game, quarters would be cut from the pot and placed in a cigar box by the dealer. The average pot was $40.00 to $100.00; the percentage cut was up to 15 percent. The pots were cut for the benefit of Noel and Donnelly, which makes the game illegal under state law.

The Chief of Detectives in Covington is in charge of gambling investigations. In January 1978, Harry Seiter was promoted to Chief of Detectives.

Seiter used his position as Chief of Detectives to warn the other defendants of investigations and close down competing games. He received payoffs in return. Two witnesses testified about this.

Jerome Wardia testified that Donnelly told a group of people that he sent Seiter to close down a competing card game. He also testified that Donnelly told him he was paying Seiter $100.00 to "keep the heat off" and that he saw Donnelly give Seiter $100.00 in cash.

Phillip Pointer testified that he saw Seiter and Donnelly together and that Seiter put a large wad of money in his pocket and said "the boys will be happy with this." He also testified that he saw Donnelly hand Thornberry some large bills.

James Thomas, a paid FBI informant, testified and pre-

sented tape recordings he made of conversations with Thornberry. Thomas testified that in March 1978, Thornberry said he had the Police Department in his pocket, that he would get Harry Seiter made Police Chief, that he had paid for promotions of unnamed Covington police and fire officers, that he had gotten the Commissioners elected and that he had gotten Seiter promoted to Captain. Thornberry said that Donnelly and Noel were paying him $450.00, in addition to his rent, which he used to pay off the Commissioners plus three policemen.

In March 1978, the FBI placed informants in the game. The Chief of Police was told about this, but Seiter, then newly promoted as Chief of Detectives, was not informed.

On March 30, 1978, the FBI and Covington Police searched 616 Washington Street. They had a search warrant. Before the search they asked Thornberry for a key, but he said he didn't have one. After the search the agents took the return on the warrant to Thornberry, who said he would give it to Mary Ann Noel.

Seiter was not informed of the raid until it was over, when he went to meet with Thornberry. Thornberry told Seiter about the raid and that he had been subpoenaed and had to appear before the federal grand jury.

The United States charged the defendants with conspiring to obstruct enforcement of the criminal laws of the Commonwealth of Kentucky. After a five-week trial, all the defendants were convicted.

In this appeal, the defendants contend that the district court erred in permitting the Government to call the card game's dealers to the stand knowing they intended to invoke their Fifth Amendment privilege. The district court noted that if the dealers testified their testimony would not be wholly cumulative and that the jury might wonder why the dealers were not called. In this case, the

Government had "an honest belief that the witness[es] [had] information which is pertinent to the issues in the case and which is admissible under applicable rules of evidence, if no privilege were claimed." *United States* v. *Compton*, 365 F.2d 1, 5 (6th Cir.) *cert. denied* 385 U.S. 956 (1966); *see also, United States* v. *Vandetti*, 623 F.2d 1144 (6th Cir. 1980). There was no error here.

The defendants assert that the district court erred because it did not answer the jury's question about Captain Al Meyer's cause of death. Nothing in the record revealed how Meyer died. The court instructed the jury:

> The second, well, actually the first question asked, that is, 'If at all possible we would like to know when and how Captain Al Meyer died.' I want to advise you that that is not in the record in this case and, therefore, you are not to speculate on whether and how he did die. It has not been put into evidence and so Instruction No. 3, which I gave to you, in your instructions you have, is that, 'You are to decide this case solely on the evidence submitted here in court.' And that's all that we can advise you of on that.

This instruction was proper and the defendants were not prejudiced by the court's response.

The prosecutor's closing argument was not "so egregious so as to render the entire trial fundamentally unfair." *Cook* v. *Bordenkircher*, 602 F.2d 117, 119 (6th Cir. 1979). The defendants' assertions that prejudicial statements made by the prosecutor amounted to reversible error are without merit given the overall tone of the advocacy.

We have examined the other contentions made by the defendants in this appeal from their convictions and find they are without merit.

The district court did not abuse its discretion in denying the defendants' motion for a new trial. It heard the

evidence and concluded that it was "not reasonably well satisfied that the testimony given at trial by Wardia was false."

AFFIRMED.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

EXHIBIT C

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

NOS. 78-5510, 78-5511, 80-5048

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

HOWARD NEWTON DONNELLY (78-5510, 80-5048),
BROWN MARTIN NOEL (78-5511, 80-5048),

Defendants-Appellants.

ORDER

(Filed April 1, 1981)

BEFORE: LIVELY, BROWN and JONES, Circuit Judges.

Upon consideration, the Court concludes that the issues raised in the petition for rehearing were fully considered upon the original submission and decision of the appeal. Accordingly, the petition for rehearing is denied.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
Clerk

EXHIBIT D

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

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* * *

[948] All right, you may call another witness.

MR. AREHART: Call Fred Messer.

MR. OLDFIELD: Can we approach the bench, your Honor?

THE COURT: Yes, you may.

(The following occurred at the bench in the immediate presence of counsel and the Court:)

MR. OLDFIELD: Your Honor, I don't [949] know whether my information is absolutely correct, but I have information that this witness is going to take the Fifth Amendment. If that is correct, I would request permission to voir dire the witness outside of the presence of the jury and ask him if that is correct and not have him put on the witness stand in front of the jury.

MR. COBB: He has got an attorney here, too, Mr. Schaffner.

MR. PARRY: He is advised that all four of the defendants in Count 1, the additional defendants, will take the Fifth Amendment.

THE COURT: All right. I guess we had better have Mr. Schaffner come up.

MR. AREHART: I will have to go back to the *Hoffa* case. There they called 20 witnesses that took the Fifth.

(Mr. Schaffner approached the bench.)

THE COURT: All right, Mr. Schaffner, is this your client?

MR. SCHAFFNER: Yes, Your Honor.

THE COURT: Tell us what he will raise. Is it his intention to raise the Fifth?

MR. SCHAFFNER: He is going to take the Fifth Amendment, Your Honor. After I discuss [950] the matter with him, he said he wished to do that. This would be Mr. Soden and the other individuals also.

THE COURT: Do you want to take him on voir dire?

MR. OLDFIELD: Well, if that is sufficient, I object to putting a witness up in front of the jury. If the Court is going to sustain that position, I don't need to. But if the Court is going to overrule it, I need to put him on and get it right from the witness's mouth.

MR. AREHART: I believe the *Compton* case, a Sixth Circuit case, and the *Hoffa* case, — I will have to look it up, because I didn't anticipate this because when I asked Mr. Schaffner on six other occasions, he said he didn't know, they might testify or might not. He said they will probably get up there and tell the truth, so I did not anticipate that they were going to take the Fifth until half an hour ago, when he told me that. That's why I don't have the cases, but I believe this has been before the Court in the last trial you had up in Covington, the *Riddle* case, and we take the same position, that if he is going to take the Fifth, that we be allowed to ask him his name [951] and ask him if he knows the defendant and if he communicates he is going to take the Fifth, we will stop at that point.

MR. OLDFIELD: Your Honor, there is a case — and I can't recall the name of it — I think I have it in my file, Supreme Court case, decided some years ago, within the last ten years, that indicates that when it is made clear,

you know, to the United States Attorney and to the Court, prior to the witness's being subpoenaed and going on the witness stand, that it is error to put him in front of the jury solely for the purpose of having him take the Fifth Amendment, because it is obvious what is being done, drawing some inference of guilt from this witness by his taking the Fifth Amendment.

MR. AREHART: Well, we don't know until we ask him.

MR. OLDFIELD: We can ask him on voir dire.

THE COURT: Well, we will excuse the jury and then you can ask him and then we will resolve the legal question, if that's what you want to do, and I will make a decision based on that and give you a chance to look up any authorities you [952] want to.

MR. OLDFIELD: I appreciate that.

(Thereupon the colloquy at the bench ended.)

THE COURT: Now, ladies and gentlemen of the jury, I'm going to let you go back upstairs for a few minutes. Keep in mind the admonitions we have previously given to you. We anticipate that you will be up there for ten minutes or a little longer.

So, Mr. Marshal, you may let the jury go upstairs.

(The jury retired from the courtroom.)

THE COURT: Let the record show all jurors are out of the courtroom.

All right, let Mr. Messer be sworn and take the stand.

Fred Edward Messer,

being called as a witness in behalf of the government, first being duly sworn, testified as follows:

THE COURT: All right, Mr. Arehart, you may question the witness.

Let the record show his counsel, Mr. Schaffner, is in the courtroom.

DIRECT EXAMINATION

[953] BY MR. AREHART:

Q. State your name, sir.

A. Fred Edward Messer.

Q. Where do you live?

A. I take the Fifth. I refuse to answer any questions on the grounds it may incriminate me.

MR. AREHART: If your Honor please, I would ask that he be compelled to answer where he lives. I don't believe that is a statement against self-incrimination.

THE COURT: Well, it might tend to be, so I will allow him to assert that privilege. There is always some question about where he lives, although he may have waived it by signing a bond in this case, but anyway, I won't require him to answer that.

Q. Are you also known by the name "Fat Freddy"?

A. I refuse to answer any questions on the grounds it may incriminate me.

Q. Do you know a man by the name of Howard Donnelly?

A. I refuse to answer the question on the grounds that it may incriminate me.

Q. Brownie Noel?

A. I refuse to answer the questions on the grounds that it may incriminate me.

[954] Q. Harold Thornberry?

A. I refuse to answer the question on the grounds that it may incriminate me.

Q. Harry Seiter?

A. I refuse to answer the question on the grounds that it may incriminate me.

Q. Will you tell us the date you were born?

A. I refuse to answer on the grounds that it may incriminate me.

THE COURT: Well, I think you will be required to answer that.

A. August 31, 1944.

MR. AREHART: That's all I have, your Honor.

THE COURT: All right. Any other counsel want to ask any questions? All right, you may step down temporarily, Mr. Messer.

All right, Mr. Oldfield, have you found your case?

MR. OLDFIELD: No, your Honor, not at this point, but I –

THE COURT: All right, we will call a recess at this point and I will look at the cases cited by the United States. If you find yours in the meantime, you can send it in to my [955] office.

MR. OLDFIELD: Do you want to put the other witnesses on for purposes of voir dire at this point, that the Court has been advised will take the Fifth and find out if that is a fact? I don't know.

MR. AREHART: I think the statement of their attorney will be sufficient. I will stipulate to it.

MR. OLDFIELD: Fine. We will save time.

THE COURT: Mr. Schaffner, is that correct, your other clients would do the same?

MR. SCHAFFNER: Yes, sir.

THE COURT: If there is no contention about it, we

can accept for purposes of the motion to exclude that all the rest would, in fact, take the Fifth Amendment, so I can rule on it based upon that.

All right, Mr. Marshal, you may declare a recess of the court until 3:30 this afternoon.

(The court recessed until 3:30 P.M., at which time the following occurred:)

THE COURT: All right, let the record show all defendants and all counsel are [956] present. No jurors are present.

All right, gentlemen, have you gotten any further authority or want to state anything else about this issue?

MR. OLDFIELD: Your Honor, I apologize to the Court. The case I referred to, for the life of me, I cannot remember. I called my office and I can't find it in the other case file. It was in the case I think of *United States* v. *Riddle,* and I ran across it in my research and put a notation in the file but our secretary hasn't figured out my organization and hasn't found it, but they said they would call me back. I believe Mr. Parry found one case out of the Ninth Circuit. Is that correct?

MR. PARRY: Yes.

MR. OLDFIELD: The case authority that the United States is relying on, I believe in the Riddle case they claimed that they had no way of knowing what the witness was going to do until the witness actually testified. In the *Riddle* case, quite frankly, it did not dawn on me or other counsel that the witness be placed under oath and be voir dired, and in this case he has been placed under oath and said that he would. So now [957] I do not believe the United States can rely on the *Caldwell* case, because the United States does know, in fact, what the witness is going to do, has been told under oath what the witness is going to do, and I don't see what the United

States hopes to derive from the witness. You know, the only thing the United States can hope to derive from this witness is some inference of guilt by these people taking the Fifth Amendment, and clearly, your Honor, that is not acceptable. There should be no inference of guilt taken from that. There should be no inference whatsoever, a witness's refusal to testify, and I can see no proof that the United States would in any way hope to derive.

THE COURT: All right, any other defense counsel want to say anything?

Mr. Arehart, what do you say in response to his statement?

MR. AREHART: If your Honor please, I think we did, as I recall, take one or two of the witnesses in the *Riddle* case outside the presence of the jury. In any event, no one attorney approached the bench and advised that he was going to take the Fifth, and I had to put a statement in there that I had information that the witness [958] did have information relative to this trial, and I think the same thing is clear from here. From the testimony it is obvious to the Court that each of these witnesses has information which would be relevant to this trial, and I think we do not have to be bound by some representations of anybody until he is actually placed under oath in front of the jury. Because he is under oath outside of the jury, I think when the rules were rewritten, the rules of evidence, such as impeaching your own witnesses, they said that each party takes a witness as he is. You can impeach your own witness. Now, what we're trying to do is not impeach them, but I'm just relying on that, saying the rules, when they wrote that rule, they said you cannot anticipate what a witness is going to do until he does it in front of a jury, regardless of what he has done some other time, and that's why they say that you can impeach

your own witness. And we rely on the same thing here. Until he does it – I think we have a responsibility to call these people. They have, in fact, been mentioned throughout this trial and the jury I think has a right to have these witnesses called and let them assert their privilege and get them out. I think I owe that [959] duty to them. In fact, I think one of these cases holds that we have a duty and responsibility to put a witness on if they have information, even if I think they're going to take the Fifth.

THE COURT: There is a real conflict in what the parties have cited here.

Mr. Slukich, do you want to say anything?

MR. SLUKICH: I just like to get up every now and then. The only think I would add relative to Mr. Arehart's position is that, number one, the individuals that he seeks to call are indicted, arising out of the transactions with all these gentlemen. They are defendants in a case and it will at least be my thinking or my position that that anticipation of calling a defendant who is jointly indicted with all these defendants in a conspiracy charge, I would anticipate and I would have the greater position of knowing that they would assert the Fifth, and my seeking to bring them on as a witness and my duties and responsibilities, as everybody espoused here, I would know that I am not going to get anything out of those people, because down the road they're going to have to involve themselves in a trial, present evidence, if any, in their own defense.

[960] THE COURT: Well, that does make it slightly different there. They are codefendants in a separate case with these defendants. There is no question about that.

Anybody else want to say anything?

MR. VINCENT: Just to join in the remarks made by Mr. Oldfield and Mr. Slukich, Judge, that this indictment, the first two counts are filed pending against at least this witness here and the other three that are supposed to be called, and to require them to even go through the appearance before a jury is also not only detrimental to them, but to require them to take the Fifth in front of the jury reflects back on the people here who are supposed to be the boss of the game.

I mean there has been some testimony that the present defendants — or some of them — it's their game, that they run the game, and that these other people were paid, the ones that are going to testify, were paid by these people; and to require them to take the Fifth in front of this jury would certainly look like they were being put up to it by these defendants, and also the remarks made by Mr. Slukich that they are not potential defendants, they are defendants in this same transaction.

[961] THE COURT: Well, of course the jury doesn't know that, but from a legal standpoint that's correct.

Gentlemen, there is only one way as far as I can see to resolve the question. I think there is a direct conflict here in the Circuits. The defendants have cited a later case, which is *U. S.* v. *Roberts*, 503 F.2d 591, where the Court said the government may not call a witness knowing he will refuse to testify. It does not cite any authority for that, but states it just as a principle. In that case the exact facts of that were, however, that one defendant wanted to call a codefendant and the Court would not allow that to occur. It was a codefendant who had previously pleaded guilty and the Court held it was not error for the District Court not to require that that witness take the stand and testify.

Now, against that are a couple of cases out of the Sixth

Circuit, which to my knowledge have not been overruled in any way, and that is one of the cases cited by the United States. It is *U. S.* v. *Compton*, 365 F. 2d 1, in 1966, and *certiorari* was denied. And it cites a previous case of *U. S.* v. *Terry*, 362 F. 2d 914.

[962] In the Compton case there were three judges on that panel who are still on the Sixth Circuit and Judge Cecil, writing for the majority, did reverse it but reversed it on a question which was all-inclusive asked by the United States, but the Court there said that government counsel need not refrain from calling a witness whose attorney appears in Court and advises Court and counsel that the witness will claim and his privilege and will not testify. And it says counsel must have an honest belief that the witness has information which is pertinent to the issue in the case and which is admissible under applicable rules of evidence if no privilege were claimed.

Now, the other case, the *Terry* case, it's slightly different, and in that case the Judge, the District Court, was requested to conduct a separate hearing and make the government make a record of a question it was going to ask and the trial Judge there declared he couldn't determine whether the privilege was proper until it was made in front of the jury. I think those cases are close enough where the United States can produce the witnesses who are codefendants, can ask them certain limited questions. Although I let Mr. Messer raise the [963] Fifth Amendment on his address, according to *U. S.* v. *Compton* he can't raise it on the address. So I'm going to advise him he is going to have to answer that question and he can be asked his name, address, age, and you may ask him if you desire — you don't have to ask him these questions — you may ask him if he knows any of the codefendants and then ask him if asked further questions he would assert his rights

under the Fifth Amendment. I think I will limit it to those questions unless you think of anything else that should be asked.

Yes, Mr. Cobb.

MR. COBB: While the discussion was going on, I located two additional cases in U. S. C., in the annotations. They are both 1973 cases and they both say where the prosecutor knew in advance that the two witnesses whom it planned to call would invoke the privilege against self-incrimination and refuse to testify, calling the witness was improper and prejudicial.

THE COURT: What circuit?

MR. COBB: They are both – there was a Pennsylvania case reported in 307 *Atlantic* 2d, page 229. That is the *Commonwealth* v. *Duval,* and the other case is a Colorado case, *People* v. [964] *Scheidt,* 513 Pacific 2d 446. There are these two additional ones that seem to stand for this proposition.

THE COURT: Well, you don't need to show them to me because I think the Sixth Circuit is in contradiction to the Ninth and, for example, in contradiction to those state cases, and I think the rule is still clear and I will permit these questions to be asked.

MR. PARRY: I don't know whether I put it on the record yet, but on behalf of the Defendant Seiter we would object to this and also object to the questions that the Court is allowing the prosecution to ask.

THE COURT: I think in a way the jury has a right to wonder why witnesses are not called and I will instruct the jury if you gentlemen desire it, that the privilege under the Fifth Amendment to the Constitution is a personal one and it may be raised only by the person to whom the question is asked and they may not infer any-

thing against any of the defendants or against anyone else by virtue of that privilege.

Do you want that admonition, gentlemen?

MR. PARRY: Your Honor, in lieu of [965] calling the witnesses in here and letting them do that, we will on behalf of the Defendant Seiter request that the Court tell the jury that these four witnesses are not being called by the prosecution because they would take the Fifth Amendment and wouldn't testify to anything except their name and address. That explains to the jury Mr. Arehart's concern, why he didn't call them.

THE COURT: What do you other gentlemen say about that?

MR. OLDFIELD: I would rather have half the bite of the apple than none at all. I would rather have that than have these four people stand up and take the Fifth Amendment in front of this jury, your Honor. It can only be done for the purpose of inflicting some prejudice against these four defendants. It can serve no other purpose. Mr. Arehart doesn't have any interview sheet with him. They haven't talked to him, they haven't told him anything, they haven't waived their privilege. He has been told by the witness's mouth that they are going to take the Fifth Amendment. It serves no purpose. It is done solely for the purpose of prejudice.

THE COURT: Mr. Slukich, what do [966] you say?

MR. SLUKICH: If the Court is indicating to us that it is going to instruct the U. S. Attorney to ask the name, address and age, I think that would be sufficient. Any consideration or any questioning regarding the knowledge of any of these defendants is getting into evidence by inference that which they could not do, since that individual was asked or asserted the privilege. I think I have no disagreement with the Court's instructions that the United

States Attorney ask the name, age and address, if that's the Court's ruling, but I think anything beyond that creates a mode of answering the various questions that he will propound and present to him. I would object to that, your Honor. Following the Court's ruling — I'm objecting to the process of permitting them to be called, but following the Court's ruling I think it even should be limited with respect to the name, age and address.

THE COURT: What do you say about Mr. Parry's suggestion, Mr. Slukich?

MR. VINCENT: To embellish my brother Oldfield's remarks, if your Honor please, I want to say for the record that I believe Mr. Arehart [967] knows or should know that these particular four witnesses, especially the one who has already advised he wants to take the Fifth, will add no new evidence to his case. We have heard repeatedly over and over again about a poker game, about the cut, about the amount of the cut, this, that any the other, and that's all he could hope to gain out of even examining these witnesses, is corroboration of testimony that the record is full of. In fact, the Court has been very patient to just continue about the cut. I can almost repeat it from memory. But the only other thing he has, he has got them in the game, he has got them dealing and he has got the pot, and I say Mr. Arehart knows what they are going to say or close to it. They don't add anything to his case. He doesn't need them. That's what I want to say.

THE COURT: Well, I think if they were to testify fully, that probably they would add something, based on the other testimony, since they could tell the number of days they came a week and so on. Nobody else seems to know that. There's a lot of it which would, of course, be strictly cumulative to what the other witnesses have said.

[968] All right, Mr. Cobb, did you want to say anything?

MR. COBB: Only, your Honor, that I think the real issue here is not what they would say, but the fact that they have a right to assert the Fifth Amendment. The real issue is that the prosecutor knows that they're going to assert that right. The Court knows it because of the voir dire and because of the representation of Mr. Schaffner, and what I'm saying is that it's prejudicial because, knowing that, then to go ahead and call them in front of the jury, we know — you know, all we know is that there will be an inference and, obviously, this is a matter which raises great questions in all the 12 people's minds. Each of those 12 people may have a different reaction to that, but whatever it is, it's not going to be anything but prejudicial to the defendant. For those reasons we think that is what these cases that I have cited say.

THE COURT: Well, Mr. Slukich, you never did say what your thought was on Mr. Parry's suggestion.

MR. SLUKICH: So long as I'm not waiving my objection, I will go along with it. I still want to preserve my objection to the [969] introduction of any of the witnesses and any information concerning their assertion of their rights to take the Fifth Amendment. I do not desire to waive that. If the Court — as far as that suggestion, I would be amenable to that, as opposed to calling them for the limited purpose of name, address, age, and they are going to take the Fifth, and the Court instructs accordingly.

THE COURT: All right.

MR. COBB: The only further thing, Judge, the Court gives an admonition to the jury to correct something that in effect has gone amiss. Here we have the opportunity by not putting them up there to not have it go amiss or to raise any bad presumption in their minds. Conse-

quently, knowing it ahead of time is the reason we don't call them.

THE COURT: Well, I understand what you're saying, but the jury still may wonder why these persons aren't here, who obviously were right in the place, you know, that the testimony has gone on about.

MR. COBB: For the record we are saying, not to quarrel with you, but we are objecting to the admonishment also because we think it [970] is improper to give the admonishment and unnecessary in view of the fact that the opportunity presents itself not to call them.

THE COURT: Well, if they're put on, though, I won't give the admonishment if you don't want it, of course. If you don't want any admonishment at all, I won't give that. Since there's so much disagreement, what I'll do is I'll let the U. S. call the witness, I'll not allow the asking if they know any of the defendants. You may ask the name, age and address and if asked any questions about this case, if they would assert their rights under the Fifth Amendment. And then if they say they would, that will be the end of it and I will admonish the jury.

MR. PARRY: Your Honor, I want the record to be clear that I did not intend to waive my previous objection by making those suggestions.

THE COURT: I understand.

MR. AREHART: Could I ask them to show the witness their picture that has been introduced and ask them if that's it?

THE COURT: I suppose —

MR. AREHART: They're already in evidence.

[971] THE COURT: Yes, you can let them look at their own pictures. I suppose they can't raise the Fifth Amendment on whether it's themselves.

Mr. Schaffner, what do you say?

MR. SCHAFFNER: Your Honor, I have two small problems. First I object to their being shown a picture and being forced to testify that that is them.

Secondly, I don't want to be seen with either group in this room. I have no objection to Mr. Arehart and defense counsel, but I don't want to prejudice either case and there's no place for me to go except perhaps behind the witness box.

THE COURT: Do you want to sit there or do you want to stand?

MR. SCHAFFNER: No, I don't want to sit in the box with them, but I want to be someplace close to them. I don't want to obstruct the view.

Perhaps if I could get around her desk.

THE COURT: All right, you can do that, or perhaps we can put a chair for you and you can sit by the clerk, if you want to.

MR. SCHAFFNER: That would be fine. [972] As I understand the Court's ruling, you are going to let Mr. Arehart show them the pictures and inquire if that's their likeness in the pictures?

THE COURT: Yes, ask them if that's them, if that is that person. Yes, sir. I don't know any self-incrimination that would cause.

MR. SLUKICH: May I respond, your Honor?

THE COURT: All right.

MR. SLUKICH: There have been a half a dozen people get up here and hold these pictures in their hands and say, "Yeah, that's Fat Freddy, the dealer," or, "This is Chalk, Rodney, the dealer," or, "This is Rue, the dealer," and to permit and to require that individual to say, "Yeah, that's my picture," sure takes that gun and sticks it right up in his head and makes him a dealer and you're taking away his privilege because he puts himself right in

that dealer's chair, right in that jury's minds, and there's no way you can erase that.

THE COURT: Well, it might do that, but I just wonder whether this identification of your own picture is a matter of self-incrimination.

[973] MR. VINCENT: That's what Mr. Slukich is urging on the Court, and I join him, that to require them to do that is compelling them to give testimony against themselves. You've entered the field, you've opened the gate.

THE COURT: All right. I will not allow the U. S. to ask that. I guess the U. S. may argue that and show that to the jury at an appropriate time, that that's the same man that took the stand, so I will just let you ask the other questions.

MR. AREHART: I will ask that the jury be exhibited photographs when these people testify. If I can do it later, there's no reason I can't do it now.

MR. VINCENT: Your Honor, there's a rule of law that has been modified, that when you need a picture to explain some element of the case or some facts in the fact that's necessary to constitute an element, the picture is admissible. But these pictures here serve no purpose except to identify the dealers, and when you ask these witnesses or pass a picture around, the jury has already seen these pictures, and to require the marshal to hand it to the jury with the defendant [974] in the box, that's the same thing as — he can't refute it, he can't say, "That's not me."

THE COURT: Well, I'm not going to allow that question to be asked.

MR. AREHART: It gives the jury an understanding, your Honor, of who we're talking about.

THE COURT: Well, I won't let you have those pic-

tures passed to the jury at this time. I think they have already seen those pictures at one time, and if you show them to them again, I guess it would unduly emphasize that. I think the jury will remember those pictures all right.

So, Mr. Schaffner, you may come up here.

Let the jury come in, Mr. Marshal.

MR. SLUKICH: Just to save a little time, I was going to move for a mistrial, just assuming the Court's ruling, it is overruled, subject to what we will hear in advance, so I won't have to do it later.

THE COURT: All right.

MR. VINCENT: I join in that.

MR. OLDFIELD: Likewise.

MR. AREHART: So I get the ruling [975] straight, your Honor, I can ask the witness his name, address, age, et cetera, if he intends to rely on his privilege of self-incrimination as to any question that might be asked to him concerning this case and these four defendants —

THE COURT: Yes, I think that's —

MR. AREHART: (Continuing)

— without naming them, just the defendants on trial or the four defendants?

THE COURT: Yes, this case, any question pertaining to this case.

MR. AREHART: I want to be sure that we're talking about this trial here.

THE COURT: Yes, this case.

All right, let the jury come in.

(The jury returned into the courtroom and resumed its place in the jury box.)

THE COURT: Let the record show all jurors are present.

Let Mr. Messer come back on the stand.

He hasn't been sworn, has he?
THE CLERK: Yes.

Fred Edward Messer, resuming

DIRECT EXAMINATION

BY MR. AREHART:

[976] Q. Will you state your name, sir?
A. My name is Fred Edward Messer.
Q. Are you also known as "Fat Freddy"?
A. Yes, sir.
Q. Where do you live?
A. 1026 Lee, Covington.
Q. And what is your age?
A. Thirty-four.
Q. I would ask you, sir, if you intend on advice of your attorney to assert your privilege against self-incrimination as to any and all questions I might ask you concerning this case and these defendants?
A. Yes, sir.
MR. SLUKICH: Objection to the question, your Honor.
THE COURT: Well, overruled.
Q. Please?
A. I said yes, sir.
MR. AREHART: That's all, your Honor.
THE COURT: All right.
MR. SLUKICH: I have nothing.
THE COURT: Any questions?
MR. VINCENT: No questions, Judge.
THE COURT: All right, you may step down, Mr. Messer.
[977] MR. SCHAFFNER: May he be finally excused?

THE COURT: Any objection to his being finally excused?

MR. OLDFIELD: None, your Honor.

May we approach the bench?

THE COURT: Yes. Come up.

(The following occurred at the bench in the immediate presence of counsel and the Court:)

MR. OLDFIELD: Your Honor, the Court instructed Mr. Oldfield as to what he should ask, the name, address, age and whether he was going to take the Fifth. Now he went and asked the name and also if he was known as "Fat Freddy" which has nothing to do with it, and the next thing, the language the Court approved was, "whether or not you are going to take the Fifth about anything about this case," and he said, "This case and the defendant's," and the Court excluded that.

MR. AREHART: That's wrong, because I asked the Court if I could ask him this case and the defendant's.

THE COURT: Well, I said just this case. I will sustain the objection, but I think it is synonymous. But the others should only be [978] asked pertaining to this case.

MR. SLUKICH: It was the Court's instruction, and it's in the record and that was the only purpose of my objection.

THE COURT: Yes, but since it's already out and he said yes, there is less harm in leaving than there is to reask the same question and he would say he would take the Fifth Amendment. And when he said this, when he was asked about the defendant, the defendants' names were not put in.

MR. AREHART: Can the Court advise the jury who this man is sitting here?

MR. VINCENT: The defendant Noel renews his motion for a mistrial, your Honor, so the record will be straight.

THE COURT: Let that be overruled.

MR. OLDFIELD: Join in the motion for all.

THE COURT: If you want me to strike the question and have Mr. Messer come back on the stand, I will do that.

MR. OLDFIELD: That doesn't do any good.

MR. AREHART: Can I ask about a nickname?

[979] THE COURT: Well, just ask him if this is his name, what his name is. Don't ask about any nickname.

MR. AREHART: Well, I think half of these witnesses, your Honor, identify these people by nicknames. That's the only way to associate them. One is Big A, which is Alan Rue. That's all they knew him by.

THE COURT: Well, I think they have already identified them by the pictures.

MR. AREHART: Okay. I will abide by the Court's ruling. Thank you.

(Thereupon the colloquy at the bench ended.)

THE COURT: Now, ladies and gentlemen of the jury, the gentleman who is seated here by the front with permission of the Court is an attorney, Charles Schaffner, attorney from Northern Kentucky, and he is the attorney for Mr. Messer and certain others. So he may consult with them. He is not associated in any way with any other counsel on either side in this case.

And I also want to advise you that raising the Fifth Amendment privilege, which Mr. Messer did in this case, is a privilege which is personal to him and only that person can assert such privilege. [980] It is a privilege allowed him under the Constitution, and by virtue of his

raising that privilege, that should not in any way raise any inference of guilt or innocence pertaining to any defendant in this particular case.

Now, are there any additional admonitions anyone wants the Court to give?

All right. This pertains, this admonition pertains to the testimony of any other witness who might come in this case and assert a Fifth Amendment privilege.

All right, you may call another witness, Mr. Arehart.

MR. AREHART: The United States calls Edward Soden.

Edward Soden,

being called as a witness in behalf of the government, first being duly sworn, testified as follows:

THE COURT: Mr. Schaffner also represents Mr. Soden, ladies and gentlemen.

DIRECT EXAMINATION

BY MR. AREHART:

Q. Will you state your name, sir?

A. Edward Soden.

Q. And where do you live?

[981] A. 32 West Sixth Street, Covington, Kentucky.

Q. And what is your age?

A. Fifty-six.

Q. Sir, let me ask you if upon the advice of your attorney you intend to rely on your privilege against self-incrimination as to each and every question I might ask you about this case.

A. Yes.

MR. AREHART: That's all the questions I have.

THE COURT: All right, any further questions?

MR. SLUKICH: I have no further questions.
MR. PARRY: I have no questions.
MR. OLDFIELD: I have one question.

CROSS-EXAMINATION

BY MR. OLDFIELD:

Q. Would your answer be the same as to questions I might ask you?

A. Yes.

MR. OLDFIELD: Thank you.

THE COURT: Any other questions by anyone?

All right, you may step down, Mr. Soden.

[982] MR. SCHAFFNER: May he be finally excused?

THE COURT: May he be finally excused, gentlemen?

MR. SLUKICH: Yes.

THE COURT: All right. The same admonition pertains to his testimony as pertains to the testimony of Mr. Messer, ladies and gentlemen.

All right, you may call another.

MR. AREHART: Rodney Chalk.

Rodney Joseph Chalk,

being called as a witness in behalf of the government, first being duly sworn, testified as follows:

THE COURT: Mr. Schaffner also represents Mr. Chalk, ladies and gentlemen.

DIRECT EXAMINATION

BY MR. AREHART:

Q. Would you state your name?

A. Rodney Joseph Chalk.

Q. Where do you live?

A. 49 East Tenth Street, Newport.

Q. What is your age, sir?

A. Twenty-eight.

Q. I will ask you, sir, if upon the advice of your [983] attorney that you intend to rely upon your privilege of self-incrimination as to each and every question I might ask you or defense attorneys might ask you about this case?

A. Yes, I do.

MR. AREHART: That's all, your Honor.

THE COURT: Gentlemen?

MR. SLUKICH: No questions, your Honor.

MR. VINCENT: No questions.

MR. OLDFIELD: Nothing for the Defendant Thornberry.

MR. SCHAFFNER: May he be excused?

THE COURT: Yes, he may be.

The same admonition pertains to his testimony as pertains to the testimony of Mr. Messner and Mr. Soden.

You may call another witness for the United States.

MR. AREHART: The United States calls Alan Rue.

Sanford Alan Rue,

being called as a witness in behalf of the government, first being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. AREHART:

[984] Q. Will you state your name, sir?

A. Sanford Alan Rue.

Q. Where do you live?

A. 260 West Seventh Street, Covington, Kentucky.

Q. How old are you, sir?

A. Thirty-six.

Q. Is it your intention, Mr. Rue, to assert the privilege, based upon the advice of your attorney to assert your privilege against self-incrimination as to each and every question I might ask you or defense attorneys might ask you concerning this case?

A. It is.

MR. AREHART: That's all the questions I have.

THE COURT: All right, any questions?

MR. SLUKICH: Nothing, your Honor.

MR. VINCENT: Nothing, your Honor.

MR. OLDFIELD: Nothing, your Honor.

MR. PARRY: No questions.

THE COURT: All right, you may step down, Mr. Rue.

MR. SCHAFFNER: May he be finally excused, your Honor?

THE COURT: All right, any [985] objection to his being finally excused?

MR. SLUKICH: No.

THE COURT: He is also represented by Mr. Schaffner and the same admonition pertains to his testimony as pertains to the testimony of Mr. Messer, Mr. Soden and Mr. Chalk.

You may call another witness for the United States.

MR. VINCENT: Your Honor, may we approach the bench?

THE COURT: All right, come up, gentlemen.

(The following occurred at the bench in the immediate presence of counsel and the Court:)

MR. COBB: If your Honor please, at this time on behalf of the Defendant Thornberry we move to declare a mistrial and set aside the swearing of the jury for the reasons set forth previously, that we feel it is highly pre-

judicial to the rights of the defendant for the prosecutor now having called a total of four witnesses, knowing in advance of calling them that all four of them would take the Fifth Amendment, and for the reasons set forth in the *Roberts* case, the *Sheidt* case and the *Duval* case, which we have [986] previously cited to the Court, we respectfully move the Court to declare a mistrial.

MR. VINCENT: And set aside the swearing of the jury, and we join in it.

MR. PARRY: We join in that motion.

MR. SLUKICH: The Court has previously ruled.

THE COURT: Mr. Arehart?

MR. AREHART: Other than to rely on the ruling in the *Compton* case, which says that I can call a witness knowing he is going to take the Fifth Amendment.

THE COURT: Let the motion to set aside the swearing of the jury be overruled and the motion for a mistrial.

(Thereupon the colloquy at the bench ended.)

* * *

EXCERPT FROM PLAINTIFF'S CLOSING ARGUMENT

* * *

[3529] Now, we have to prove that it lasted for a substantially continuous 30-day period and that there were five or more people involved in running this game. I anticipate that the Court will instruct you that this means all, anybody other than players, who had any hand in this game. It would include dealers, it [3530] would include the cleanup boy, it would include a waitress who served food and, of course, it would include Mr. Donnelly and Mr. Noel, if you believe that they were the operators of this game. And it doesn't have to be, ladies and gentlemen, the same five people for the whole continuous 30 days. It can be five different people, as long as you belive that the defendants were one of those five people during that period. And the defendant himself doesn't have to be there for the whole 30 days, as long as he — the 30 days applies to the business itself, you know, did the game exist for 30 days? And if you get over that hurdle, then you decide whether or not there were five people during those 30 days, whether they were the same five people or not doesn't matter under law.

* * *

[3534] You get to the dealers. Now, the United States brought these dealers in here and put them on the stand. But we didn't get anything out of them. And you are not to infer, you know, that that is anything against the defendants. But we wanted to put all the people on that we could that were at that game and obviously the dealers were at that game, and to have them tell you what was going on. But the testimony of the players was that these dealers definitely cut the pot, and the reason that they were cutting the pot, according to the players, was the

more you play, the faster you play, in a half-hour shift, the more money goes into that box. And, of course, the defendants propounded the theory that, well, it was just to keep all the money straight and so forth and so on. But that's another factual dispute that you will have to [3535] decide. And I think it goes without a doubt that Mr. Donnelly, who, witnesses have testified, had the reputation of being an operator of a game, would be doing this to make money, not to just keep the money straight among the players. Why would he even be there all this time if he didn't have an interest in this? The testimony was that he played very seldom, that he did play but he played very seldom. What was his interest in this game that he would be there for 12 hours a day? So I think it's pretty obvious, ladies and gentlemen, that this game was an illegal game. I don't think there is any way you can get over that.

* * *

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NO. 80-1822

In The

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

HAROLD ANCLE THORNBERRY,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

SUPPLEMENTAL PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

W. ROBERT LOTZ, JR.
211 East Fourth Street
P.O. Box 1078
Covington, Kentucky 41012
1 (606) 261-5777

Attorney for Petitioner

COURT INDEX PRESS, INC. — 215 E. Ninth Street, Cincinnati, Ohio 45202 — (513) 241-1450

SUPPLEMENTAL QUESTION PRESENTED FOR REVIEW

ARE A DEFENDANT'S FIFTH AMENDMENT OR SIXTH AMENDMENT RIGHTS VIOLATED UNDER CIRCUMSTANCES WHERE FEDERAL AGENTS, USING AN UNDERCOVER EMPLOYEE, SURREPTITIOUSLY INITIATE AND RECORD A NUMBER OF NON-CUSTODIAL INTERROGATIONS AFTER THAT DEFENDANT, HAVING BEEN GIVEN *MIRANDA* WARNINGS, HAS FORCED TERMINATION OF ALL CUSTODIAL QUESTIONING BY CLEARLY INDICATING A DESIRE NOT TO BE INTERROGATED?

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SUPPLEMENTAL CONSTITUTIONAL PROVISIONS

Amendment Five:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law . . ."

Amendment Six:

> "In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense."

SUPPLEMENTAL STATEMENT OF THE CASE

On March 24, 1978, the Federal Bureau of Investigation outfitted James Thomas, a paid "consultant," with a body recorder and transmitter. Thomas, as part of an FBI investigation, had ingratiated himself with the Defendant Thornberry and had become Thornberry's regular gin rummy partner. As part of the investigation, Thomas was instructed by the FBI to record his conversations with Thornberry.

On March 30, 1978, the FBI, assisted by Covington Police, in furtherance of the same investigation, executed a search warrant on the building at 616 Washington Street, Covington, Kentucky. Before the search, Agents Behan and Conley went to Thornberry's apartment and asked him for a key to the Washington Street building. Thomas, who was already present in Thornberry's apartment, recorded this conversation. In the search, the FBI seized business records and other material alleged to be evidence of gambling.

After the search, the same two Agents brought the return on the search warrant to Thornberry who was still with Thomas. This conversation between the FBI Agents and Thornberry was also recorded by Thomas. The Agents told Thornberry they wanted to question him and advised him of his *Miranda* rights by presenting him with a printed form listing all of those rights. (App. 2-3) Thornberry clearly indicated he did not want to talk with the agents. (App. 3) The two Agents stopped their questioning, served Thornberry with a Subpoena to appear before a Federal Grand Jury, and left him with Thomas. Thomas stayed behind with Thornberry and recorded conversations on that day, and on the subsequent day, in which Thornberry made incriminating statements. (App. 1-15) Over

objections grounded in the fifth and sixth amendments, the content of these conversations was admitted against Thornberry at trial.

REASONS FOR GRANTING CERTIORARI ON SUPPLEMENTAL QUESTION PRESENTED FOR REVIEW

THE DECISION OF THE COURT OF APPEALS FOR THE SIXTH CIRCUIT UPHOLDING ADMISSION OF RECORDED CONVERSATIONS AGAINST PETITIONER IS IN CONFLICT WITH THE DECISIONS OF THIS COURT IN EDWARDS v. ARIZONA, — U.S. —, 49 U.S.L.W. 4496 (NO. 79-5296) (DECIDED MAY 18, 1981); MICHIGAN v. MOSLEY, 423 U.S. 96 (1975); MIRANDA v. ARIZONA, 384 U.S. 436 (1966); ESCOBEDO v. ILLINOIS, 378 U.S. 478 (1964); MASSIAH v. UNITED STATES, 377 U.S. 201 (1964).

A. Petitioner's Fifth Amendment Rights, As Developed In Edwards v. Arizona, Michigan v. Mosley, and Miranda v. Arizona, Were Violated.

Thornberry was informed of his fifth amendment rights by FBI agents and he invoked those rights by refusing to speak with the agents. (App. 3) Ostensibly, the FBI honored Thornberry's invocation of his rights when the two persons who had identified themselves as FBI agents left Thornberry's apartment; however, a paid informer/consultant, James Thomas, remained behind, wired for sound, and engaged Thornberry in conversation in incriminating areas. (App. 3-15) No attempt was made to ascertain whether Thornberry waived the *Miranda* rights

he had invoked just moments before. In fact, Thomas remained behind with Thornberry in order to circumvent Thornberry's assertion of his *Miranda* rights.

Once *Miranda* warnings have been given to an accused citizen, the interrogators must "scrupulously honor" the invocation of those rights. *Michigan* v. *Mosley,* 423 U.S. 96 (1975).

> If . . . he [the accused citizen] indicates in any manner and at any stage of the process that he wishes to consult with an attorney before speaking, there can be no questioning. Likewise, if the individual is alone and indicates in any manner that he does not wish to be interrogated, the police may not question him.

Miranda v. *Arizona,* 384 U.S. 436, 444-45 (1966).

In *Mosley,* there was a delay of two hours between the accused citizen's assertion of his rights prior to an interrogation in reference to one crime and commencement of another interrogation by another officer in reference to another crime. The *Mosley* Court held that the prohibition of questioning after the assertion of the right to remain silent did not extend for an indefinite period and that questioning could resume so long as the assertion of the right is "scrupulously honored." *Mosley,* 423 U.S. at 103-04. In *Mosley,* each interrogator read *Miranda* warnings prior to interrogation and there was a two hour gap between interrogations. In the case at hand, the interrogation of Thornberry by Thomas began as soon as the other FBI agents left the room and continued over into the next day.

In the recent case of *Edwards* v. *Arizona,* this Court held that the *Miranda* Court meant what it said — if an accused indicates a desire to remain silent, then interrogation must cease, and if an accused indicates a desire for counsel prior

to interrogation, then counsel must be provided before interrogation may continue. *Edwards* v. *Arizona,* — U.S. —, 49 U.S.L.W. 4496, 4497-98 (No. 79-5269) (decided May 18, 1981). The *Edwards* Court grounded its decision on the fifth amendment, specifically refusing to deal with a sixth amendment right to counsel issue posed by the Petitioner in that case. *Edwards,* — U.S. at —, 49 U.S.L.W. at 4497, n. 7. Fifth amendment rights include the right to refuse to incriminate oneself and the right to have counsel present at interrogation.

The *Edwards* Court also required that, once the fifth amendment right to counsel was invoked, there must be proof that the accused voluntarily, knowingly, and intelligently waived that right. *Edwards,* — U.S. at —, 49 U.S.L.W. at 4497. Proof that the accused responded to further custodial interrogation is insufficient proof of waiver.

Once informed of his fifth amendment rights as an accused, Thornberry refused to speak with the FBI agents. After the agents left the premises in honor of Thornberry's assertion of his rights, the FBI's paid informer interrogated Thornberry by engaging him in conversation in incriminating areas. Regardless of its form, interrogation is the deliberate elicitation of incriminating information and statement from an accused. *Brewer* v. *Williams,* 430 U.S. 387, 400 (1977); *Miranda* v. *Arizona,* 384 U.S. 436, 461 (1966); *Massiah* v. *United States,* 377 U.S. 201, 206 (1964). "The term 'interrogation' under Miranda refers not only to express questioning, but also to any words or actions on the part of the police (other than those normally attendant to arrest and custody) that the police should know are reasonably likely to elicit an incriminating response from the suspect." *Rhode Island* v. *Innis,* 446 U.S. 291, 301 (1980) (footnotes omitted). Whether

Thomas' deliberate elicitation of incriminating statements was as a result of a classic question and answer interrogation or was a surreptitious elicitation is "constitutionally irrelevant." *Brewer,* 430 U.S. at 400-402. *See,* Kamisar, "*Brewer* v. *Williams, Massiah,* and *Miranda*: What is Interrogation? When Does It Matter?" 67 Geo. L.J. 1-101 (1978). It was for the deliberate purpose of eliciting and recording incriminating information that Thomas ingratiated himself with Thornberry and remained with Thornberry after the FBI agents left the room.

Thornberry invoked his rights under the fifth amendment and that invocation was circumvented by surreptitious interrogation by a paid FBI informant. In contravention of *Michigan* v. *Mosley,* the FBI did not scrupulously honor Thornberry's invocation of his rights. The FBI paid the informant for the purpose of defying the invocation of those rights. Over eighteen hours of recorded conversation, and untold time spent by the informant in endearing himself to Thornberry, culminated in the conversations that were recorded after Thornberry invoked his fifth amendment rights and that contained statements by Thornberry incriminating himself. No proof was presented at trial that Thornberry knowingly, intelligently, or voluntarily waived the rights he invoked; rather, the recorded conversations show that there was no gap between Thornberry's refusal to speak to the FBI and his conversations with Thomas.

Among the fifth amendment rights invoked by Thornberry's refusal to speak with the FBI is the right to have counsel present at interrogation. In contravention of *Edwards* v. *Arizona,* no counsel was present at Thornberry's continued interrogation and Thornberry did not waive the right to have counsel present. Simple response to further interrogation by Thornberry, even though voluntary, did

not constitute a knowing and intelligent waiver of the rights he had previously invoked.

In this case, the FBI has been allowed, by the holdings of the lower court, to circumvent the holdings of this Court in *Edwards* v. *Arizona, Michigan* v. *Mosley,* and *Miranda* v. *Arizona.* By remaining with the accused after he invoked his fifth amendment rights, the FBI was not merely investigating a case, but was deliberately eliciting incriminating information from the accused.

B. Petitioner's Sixth Amendment Rights, Which Were Developed In Massiah v. United States And Escobedo v. Illinois, Were Violated.

By the time the FBI Agents presented Thornberry with the printed *Miranda* warnings, they had focused on him as an accused in their investigation of criminal activity. The FBI had placed a paid informant in the presence of Thornberry who was wired for sound to record conversations in which he elicited incriminating information from Thornberry. The FBI had obtained the key to the building at 616 Washington Avenue from Thornberry and had already searched the building. The FBI presented the return on the Warrant to Thornberry, even though the building was rented to other persons and they were occupying the building. After Thornberry refused to speak with the Agents on the issues of this case, they presented him with a Subpoena to appear before a Federal Grand Jury investigating criminal activity in the area.

In *Escobedo* v. *Illinois,* 378 U.S. 478 (1964), the Supreme Court held that when an investigation of criminal activity had focused on one person, when the investigation had shifted from general to accusatory against one person, then refusal to honor that person's request to tremain silent or for an attorney was a violation of the sixth amendment

right to counsel and the fifth amendment right to remain silent. Escobedo asked for his attorney after being questioned by police. Even though his attorney was in the police station house, the police refused to comply with that request.

As noted by Justice Rehnquist, notwithstanding the *Miranda* decision, *Escobedo's* holding is still good law, although it should not be broadly construed. *Michigan* v. *Tucker,* 417 U.S. 433, 438 (1974). The *Escobedo* Court built on the earlier holding in *Massiah* v. *United States* that, under the sixth amendment, an accused is entitled to counsel when adversary criminal proceedings have begun. *Massiah,* 377 U.S. 201 (1964). *Escobedo* held that when the investigation of a crime had focused on one individual, that person "had, for all practical purposes, already been charged . . ." *Escobedo,* 378 U.S. at 486.

In *Massiah,* the Court suppressed statements of an accused that were obtained by a friend of the accused who was working for the Government and wore a hidden microphone. The accused in *Massiah* had been indicted and had obtained counsel at the time his friend elicited and recorded the incriminating statements. The *Escobedo* decision extended the protection established by *Massiah,* against self-incrimination and the right to counsel, to times prior to the formal institution of charges.

In the recent case of *Edwards* v. *Arizona,* this Court held that once fifth amendment rights had been asserted, they could be validly waived only on proof that there was a voluntary relinquishment of each right known to the accused. *Edwards* v. *Arizona,* — U.S. —, 49 U.S.L.W. 4496 (No. 78-5269) (Decided May 18, 1981). The Court held that there were special protections for the accused in the determination of the waiver of an asserted right to counsel. *Edwards,* — U.S. —, 49 U.S.L.W. at 4497.

In the case at hand, Thornberry was informed of his rights under the *Miranda* decision, which includes the right to counsel, and refused to speak with the FBI. Since the investigation had so obviously focused on Thornberry as an accused, under the *Escobedo* decision, he also invoked sixth amendment rights to counsel by refusing to speak when informed of, among other rights, his right to counsel. Without any proof that Thornberry waived his right to counsel, he was interrogated by the paid informant in violation of his right to counsel.

Respectfully submitted,

W. ROBERT LOTZ, JR.
211 East Fourth Street
P.O. Box 1078
Covington, Kentucky 41012
1 (606) 261-5777
Attorney for Petitioner

APPENDIX A

EXCERPTS FROM RECORDED CONVERSATIONS

Conversation Number: 5

Participants: Harold Thornberry
Special Agent Vincent W. Behan
Special Agent Patrick J. Conley
James Thomas

Date: March 30, 1978

Thomas: Yeah, I'll tell you. Well, I, I don't understand the Feds being in on this gambling, this state. I thought under the law

Thornberry: You got to close down, you got to be closed. You can't operate for thirty straight days. You can't take in so much money in one given night. You can't have so many people working for you. This is where they get you

Thomas: And he is, oh, he's been doin that

Thornberry: I don't know

Thomas: I don't either

Thornberry: I don't know. But I'm just sayin what you can't do

Thomas: Well I don't know either. Don't wanna know. Okay. Well, I just

Thornberry: I really don't know

Thomas: I, I can't understand the

Thornberry: I have never, I've never went up there

(Someone else comes in – background talk to them)

Thornberry: Yeah, come on in

Behan: Got a few minutes

Thornberry: Yeah, come on in
Behan: Alright
Conley: Was just here
Thornberry: Don't knock the door down please
Behan: You got somebody to take care of that door up there
Thornberry: A, I called and his wife said as soon as he comes in she'd call. So I'll try to get in touch with him. If not I'll get up here first thing tomorrow morning. 'cause I got a piece of plywood lying right up there that I can take up there and block up the door. Here, use this as a
Conley: You got someone up there
Thornberry: Up there?
Conley: Yeah
Thomas: Charlie
Thornberry: That's the ice man
Thomas: That's Charlie
Thornberry: That's the ice (unintelligible)
Thomas: That's Charlie
Behan: Okay, that's the inventory
Thornberry: Okay
Behan: If you will put that on the back of the, uh, search warrant
Thornberry: Okay
Behan: And give her the whole package
Thornberry: Alright, alright
Thomas: That's Charlie
Behan: Okay, I would, uh, I do want to ask you a few questions about it Harold
Thornberry: Okay, alright
Thomas: You want me to leave?
Thornberry: No, I don't care. If these guys want you to
Behan: Before I do, I just want to advise you of your rights

Thornberry: Yeah, okay
Behan: Okay?
Thornberry: Alright
Behan: Read it over
Thornberry: Alright. Why don't I just don't say nothin then I won't have to worry about nothing
Behan: Ha, ha, ha, it's your choice
Thornberry: Maybe that would be the best way to be.
Behan: Okay, I, would you care to sign that. It's just telling you that we advised, that's all it is
Thornberry: Okay, alright, okay
Behan: Okay, now do you want to talk about
Thornberry: No
Behan: The place at all. No, okay
Thornberry: What the hell did I do with that, that thing you gave me. Oh, here it is, this is what I was looking for, staple this all together. Yeah, I'll see her, no doubt tomorrow or the next day because the rent's due
Behan: Okay Harold, this is a subpoena to appear before a Grand Jury in Lexington on the sixth
Thornberry: Uh huh
Behan: Where they will ask the questions
Thornberry: Okay, alright
Behan: Okay
Thornberry: Alright, okey doke, see what the hell day is the sixth
Conley: Thursday, I think
Thornberry: Monday
Conley: Monday
Thornberry: Yeah, in fact it's Monday a week I guess it is, yeah. No hell, I'm lookin at March ain't I. We wanna look at April. A, the sixth is Thursday. Right
Behan: Right
Thornberry: Uh huh, yeah

Behan: Okay
Thornberry: Okay
Behan: Alright
Thornberry: Okay, alright
Conley: Good night Harold
Thornberry: Uh huh, I'll get that taken care of tonight or tomorrow morning
Behan: Alright
Thornberry: Okay, I own the property they asked me who rents it and this kind of stuff that what they (unintelligible).
Thomas: Three, six, eleven
Thornberry: Oh hell (unintelligible)
Thomas: Motherfuck that shit, buddy I should have stayed in Metamora

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Conversation Number: 6

Participants: Harold Thornberry
Harry Seiter
James Thomas

Date: March 30, 1978

Thomas: Who is this guy?
Thornberry: Jim, I don't know
Thomas: Oh
Thornberry: Fuck, I don't know who these guys are. I don't know nothing about them, they're FBI Agents, that's all I know about 'em. I don't know who they are and I don't give a fuck who they are
(Knock on door)
Seiter: Hello
Thomas: Hello Harry, by God, how are you?

Seiter: Hey I'm comin up that Goddamn place
Thomas: I'll buy, I'll buy you chicken
Seiter: I'm tearin that fuckin place apart
Thomas: Don't do anything like that
Seiter: I'm gettin all drunk and I'm raisin hell
Thomas: Damn
Seiter: What did I tell you?
Thornberry: What's that
Seiter: You just had visitors didn't you
Thornberry: Well sure. Yeah, yeah, they raided Howard's place
Seiter: I know they did. What did they find?
Thornberry: I don't know
Seiter: Did they get your game?
Thornberry: No, here's what they found. I'm subpoenaed for the seventh of next month
Seiter: The seventh
Thornberry: Yeah, it's on Thursday. Here's what they found
Seiter: The seventh ain't on no Thursday. The seventh is on a Friday
Thornberry: Or it's the sixth. The sixth is on a Thursday
Seiter: Bowman got a subpoena to go the seventh
Thornberry: That's what they found up there
Seiter: Playing cards
Thomas: It's your throwaway, Thornberry. A diamond run, a diamond run
Thornberry: They kicked the back door in and asked me if I can get it fixed. I told them I didn't kick it in
Seiter: That's what I would have told them. Said you get it fixed
Thomas: Go ahead, I can't stop you. I can't stop you, Gin

Thornberry: Twenty-nine
Seiter: They didn't get much did they
Thornberry: Address book they said. Telephone address book
Seiter: Is this your subpoena?
Thornberry: Uh
Seiter: Oh that's the search warrant
Thornberry: Yeah they wanted to talk to me and I said, I said I don't wanna talk
Thomas: He just flat told them no
Seiter: I don't blame him
Thornberry: I said I just don't want to talk to you
Thomas: Oh, by the way, congratulations. On the Colonel
Seiter: They're trying to take it from, all the time
Thomas: Oh bullhockey, they can't do that. That's as legal as the day is long
Thornberry: They said something about Howard renting off me. I said Howard don't rent off me
Seiter: I wouldn't have even told them that. You have to contact my attorney first before you speak to me, men
Thomas: How is Abe? Have you seen him?
Seiter: He's alright. He don't do too good
Thornberry: Nine —
Thomas: Oh, son of a
Seiter: You know, I seen them two fuckers getting in their car, they never said one word to me
Thornberry: They came down here, I was next door and they asked me for a key. They said, uh, we want to go up and look in Donnelly's place
Thomas: Thirty-one, forty, fifty
Thornberry: I said, uh, Donnelly's place? They said yeah. I said nobody by the name of Donnelly rents

off me. They said 616 Washington, I said you mean Mary Ann Noel. I said I don't have a key for it. So then we went up to Pat (unintelligible) go up and eat at the, the German joint and there they were. Then they called me over and said you sure you don't have the key for it and I said no, they said well how you want us to go in, through the window or through the door. I said it makes no difference to me how you go through. Ha, ha, ha

Seiter: That's what I'd of told them

Thornberry: I don't give a fuck

Thomas: Fifty points there. You didn't even give me a damn chance that time

Seiter: Jim, you're trying to look like one of them fuckin hillbillies up there in Indiana, ain't you?

Thomas: Oh, I got married, you know that Harry?

Seiter: No

Thomas: And a, a my wife, I don't know what's got into her, she just swears up and down I should wear a beard. So I'm doin it for her because she's got the money

Seiter: Don't hurt the image none does it?

Thomas: No, it helps the image. But I, she, she's the one that carries the money and since she carries the money I

Thornberry: You listen to her

Thomas: I listen

Seiter: You're hidin a little for old Jim though ain't cha

Thomas: Huh?

Seiter: You're hiding a little for old Jim ain't you

Thomas: About the only chance I get every dime I get he takes it from me. He don't never give me a chance

Seiter: Well lose her money in the Goddamn game. Say Honey I lost your money

Thornberry: Yeah that right, that's right, tell him you're playin for her

Thomas: I did but I lost

Seiter: Boy Jim I saw them pricks out there, they didn't say nothin about that up there, I just played dumb and went on

Thornberry: Yeah they had about twelve or fifteen of them up there

Seiter: Was there that many?

Thornberry: Yeah

Seiter: Well they was really gonna do a big thing wasn't they

Thornberry: Yeah

Seiter: Well that tells you they didn't have an inside man

Thornberry: Huh?

Seiter: That tells me they didn't have an inside man, if they had that many people to take it off and nobody in there

Thornberry: That place was bare. They weren't gonna find anything. Really unloading aren't you?

Thomas: Oh don't you you think it's about time

Thornberry: Yes, it might be too late

Thomas: Could be. Deal the card

Thornberry: Can't help it

Thomas: I can't, uh

Thornberry: Hey (unintelligible) big Al Meyers is up there and a they said, a well which door should we knock down, which is the easiest door. Well I know that side door, that door is solid. That fuckin thing. I believe this will be the easiest. Just, uh, you know, put your shoulder up and hit that motherfucker

Thomas: He bounced back about four foot

Thornberry: That motherfucker. He bounced back, he said woooo. I said try it again. He hit that son of a bitch again and it didn't budge

Seiter: So he's in on this fuckin act with them cocksuckers
Thornberry: Oh, I know he is, and he says oooh, so then he goes back in the back door was an old door, the glass, the glass was out so he just kicked it and he broke it right in half. You know. I had to laugh how Al bounched off that door twice
Thomas: That tickled him
Seiter: (Unintelligible)
Thomas: Did it upset him?
Seiter: (Unintelligible) in that department (unintelligible) and everything
Thornberry: Oh yeah, Gin (unintelligible)
Thomas: Son of a bitch, son of a bitch. Oh, I'm afraid to throw you a six
Thornberry: Six
Thomas: Fourteen
Thornberry: Twenty-five, thirty, thirty-nine
Thomas: Thirty-nine
Thornberry: One twenty-four
Thomas: A, a new leader in the pack
Seiter: I'm gonna get out of here I'm gonna let you guys play your fuckin cards
Thornberry: Okay Harry
Thomas: Harry, good to see you again
Seiter: Sometime
Thomas: Hey listen, hey listen
Thornberry: Pat says stop up and get those beer cans for you
Seiter: Huh?
Thornberry: Pat says to stop up and get those beer cans for you
Thomas: Hey, come on up and bring the family and I'll buy you
Seiter: You got a card with you?

Thomas: No, I don't have no card, I can't, you know up there
Seiter: Harold knows how to get there and everything don't he
Thornberry: Oh yeah
Thomas: Yeah, it's a nice place. I bought me a home and I
Seiter: You there all day?
Thomas: Everyday. Everyday. I just get away a couple of days a week to come down here
Seiter: About two weeks, you always there on a Sunday?
Thomas: Always there on a Sunday
Seiter: In about two weeks I'll come by
Thomas: Come on up and I'll give you the grand tour
Seiter: You can show me the town
Thomas: I'll show you the town. Thank you Harry
Thornberry: Good seein you again
Thomas: Alright, it's good seeing you
Thornberry: So long Harry. Okay baby
Thomas: I wonder how come he didn't know anything about it until just right out there. Huh?
Thornberry: Shit. He played the dummy with Schwartz
Thomas: Well that's good, he should, he should

Conversation Number: 7
Participants: Harold Thornberry
John Wardia
James Thomas
Date: March 30, 1978

Wardia: Hi Jim
Thomas: Hi John, how are you?
Wardia: Did you bring all your friends with you Goddammit

Thomas: I ain't got no friends
Wardia: I seen all them guys come in (unintelligible)
Thornberry: That was the FBI, they raided Howard. Yeah they came down and wanted me to open up the door for them and I said I don't have a key (unintelligible)

Conversation Number: 8
Participants: Harold Thornberry
James Thomas
Date: March 31, 1978

Thornberry: I know, but let me explain something
Thomas: Okay, all right
Thornberry: There's only two (unintelligible) just two individuals. I'm not worried about these individuals. In fact it was at different times so if they would cop it would be my word against theirs. Don't make any difference, there's no proof
Thomas: It takes one to indict, one to indict and two to convict, now Harris told me that, I remember that
Thornberry: All right now, we know that, I'm not worried about that. Now, as far as the guys (unintelligible) bagman, that don't mean nothin either, cause they could come back in here or come down there and find something just laying on the desk. That don't make any difference. There's nothing to that, see? Now as far as the joint up there, they can't convict me on running a gambling joint cause I had it leased out to Mary Ann Noel
Thomas: Yeah, I know that. You told me that last week
Thornberry: And she gave me the rent and paid me by check. She has her cancelled checks to prove it. All

right. I have my rent receipts to prove it. I'm not worried about it, it's horseshit. They might try to prove that the commissioners are getting money for certain things but they have to prove it, see I'm not worried, but it might be embarrassing if one or two would cop out

Thomas: Well Bowman's the only thing I'm worried about, that

Thornberry: He wouldn't say shit

Thomas: Well he said right there in the damn paper

Thornberry: He didn't say what he was goin to say

Thomas: (Unintelligible)

Thornberry: Why would he hurt himself?

Thomas: See, if you hadn't, if you hadn't said the other Goddamn night about Bowman being, about what happened when Bowman down here (unintelligible) I wouldn't thought nothin, but when I seen that, I got

Thornberry: You don't know what you're thinking, you're just like a fuckin square reading a newspaper

Thomas: Well

Thornberry: Why would he, why would he cop out and convict himself?

Thomas: Yeah, I guess you're right, well, what if they give him immunity

Thornberry: Well so what, it's his word against mine. See. Bullshit man

Thomas: You know, I just (unintelligible)

Thornberry: I don't worry (unintelligible)

Thomas: I know that, I know that, I, I, know that

Thornberry: Just like that cop back there that wanted me to give him a pay off, Meyers, all I said was, no soap no soap. In the first place, no money changed hands and they can't get you for that

Thomas: Yeah

Thornberry: Just like the time they found my tape recorder where I had it on somebody supposed to get so much money

Thomas: I remember that

Thornberry: And they gave it to the FBI and the FBI said we can't do nothin, nothin happened. That was talk only

Thomas: (Unintelligible)

Thornberry: Yeah, they told (unintelligible) me it has to happen and they have to have more than one people there, person there. They've fucked, so fuckin many humans its pitiful and they said they were going to get me because I used federal funds to buy houses with, why I never used federal funds in my life. They just startin this shit, see, trying to get people scared, that don't scare me

Thomas: No, they don't scare, that's not what I'm worried about, it's whether they scare somebody that

Thornberry: (Unintelligible)

Female: What are you doin Harold?

Thornberry: Nothin, that's it, nothin

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Nos. 80-1822, 80-2010, 80-2020

In the Supreme Court of the United States

OCTOBER TERM, 1980

HAROLD ANCLE THORNBERRY, PETITIONER

v.

UNITED STATES OF AMERICA

BROWN MARTIN NOEL AND
HOWARD NEWTON DONNELLY, PETITIONERS

v.

UNITED STATES OF AMERICA

HARRY NORMAN SEITER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

MARGARET I. MILLER
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTIONS PRESENTED

1. Whether, in the circumstances of this case, it was reversible error for the prosecutor to call to the stand, and to note in his summation, four witnesses who claimed their privilege against self-incrimination.

2. Whether the Fifth or Sixth Amendment was violated by the introduction into evidence of a tape recording of a conversation between petitioner Thornberry and an informant prior to Thornberry's arrest or indictment.

3. Whether the jury venire was unconstitutional because it was not drawn from all counties in the District.

4. Whether the district court erred in ruling that letters from a government witness to his wife were within the privilege for confidential marital communications and therefore could not be used by defense counsel to impeach the witness.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The order of the court of appeals (Pet. App. 3a-7a)[1] is unreported.

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[1]Unless otherwise indicated, "Pet. App." refers to the appendix to the petition in No. 80-1822.

JURISDICTION

The judgment of the court of appeals was entered on February 24, 1981. A petition for rehearing was denied on April 1, 1981 (Pet. App. 8a). The petition for a writ of certiorari in No. 80-1822 was filed on May 1, 1981, and a supplemental petition was filed on June 10, 1981. The petition for a writ of certiorari in No. 80-2010 was filed on May 29, 1981. The petition for a writ of certiorari in No. 80-2020 was filed on Monday, June 1, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a one-month jury trial in the United States District Court for the Eastern District of Kentucky,[2] petitioners were convicted on one count of conspiracy to obstruct the enforcement of the criminal laws of the Commonwealth of Kentucky with the intent to facilitate an illegal gambling business, in violation of 18 U.S.C. 1511. Each petitioner was sentenced to a term of five years' imprisonment (Pet. App. 2a; 80-2020 Pet. App. 2a; C.A. App. 67-68, 73-74, 76-77). The court of appeals affirmed (Pet. App. 3a-7a).

The evidence at trial, the sufficiency of which is not challenged, is summarized in the opinion of the court of appeals (Pet. App. 3a-5a). In brief, it showed that between January 1977 and March 1978 petitioners Noel and Donnelly nightly operated an illegal poker game at an apartment owned by petitioner Thornberry in Covington, Kentucky. Thornberry received rent on the apartment and a

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[2]Petitioners' first trial, held in Covington, Kentucky, ended in a mistrial when an unauthorized communication was made to one of the jurors. In light of that occurrence and the publicity about the case in the Covington area, and after considering various other locations, the district court ordered that the retrial be conducted in London, Kentucky (C.A. App. 137-138).

share of the proceeds from the poker game (C.A. App. 673-674, 677). In furtherance of their venture, petitioners and others made payoffs to city councilmen and to several police officers, including petitioner Seiter, the Covington Chief of Detectives, in order to gain information and protection and to close down competing card games (C.A. App. 372-373, 491, 536-537, 668-674, 676-677, 679-682, 693, 697-699, 850-851).

During the trial, several witnesses identified four persons who were regular dealers at the nightly games. These dealers had been indicted in two of the three counts contained in the indictment against petitioners, but those counts were severed from the instant trial.[3] At the time of petitioners' trial, the dealers were still under indictment (80-1822 Pet. 5; Pet. App. 16a-17a).

The government called the dealers as witnesses. Outside the presence of the jury, the dealers' attorney informed the court that they would refuse to testify on grounds of self-incrimination. After hearing argument, the court permitted the prosecution to call each of the dealers to the stand and ask his name, address, age, and whether he intended on advice of counsel to assert his privilege against self-incrimination regarding all questions about the case (Pet. App. 26a). The court reasoned that the dealers' testimony, if forthcoming, would "probably * * * add something" to the case that "[n]obody else seems to know * * *" (*id.* at 21a), and that the jury would otherwise "wonder why [these] witnesses are not called * * *. [T]he jury may * * * wonder why these persons aren't here, who obviously were right in the place [where the gambling occurred]" (*id.* at 19a, 23a). After the first of these witnesses was called and asserted

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[3]Following petitioners' conviction, the remaining counts against them were dismissed upon the request of the government (80-1822 Pet. 7).

the privilege, the court instructed the jury that a witness has a personal right under the Constitution to refuse to testify, and, "by virtue of his raising that privilege, that should not in any way raise any inference of guilt or innocence pertaining to any defendant in this particular case" (*id.* at 29a-30a). After inquiry by the court, defense counsel did not request any additional admonitions to the jury (*id.* at 30a). The court then informed the jury that the preceding cautionary instruction "pertains to the testimony of any other witness who might come in this case and assert a Fifth Amendment privilege" (*ibid.*), and this direction was repeated following the appearance of each of the three remaining dealers (*id.* at 31a, 32a, 33a).[4]

In addition, the government presented the testimony of an undercover informant and introduced tape recordings that the informant made of conversations with petitioner Thornberry. In these conversations Thornberry discussed his connections with the Covington Police Department and stated that he had obtained promotions for and paid bribes to various members of the Department (Pet. App. 5a).

The government also called Phillip Pointer as a witness. Pointer testified that he saw petitioners Seiter and Donnelly together and that Seiter put a large wad of money in his pocket and said " 'the boys will be happy with this.' " Pointer further testified that he observed Donnelly give Thornberry some large bills (Pet. App. 4a). As part of his cross-examination of Pointer, Seiter sought to impeach this testimony by referring to letters that Pointer had written to his wife regarding the possibility of a "deal" with the government in return for his cooperation. While allowing thorough cross-examination on the issue of a possible "deal" between Pointer and the government, the district

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[4]Four months later, each of the dealers pleaded guilty to conducting an illegal gambling business, in violation of 18 U.S.C. 1955.

court ruled that the subject of the letters was within Pointer's privilege for confidential marital communications and therefore could not be inquired into.

ARGUMENT

1. Arguing that the decisions of the court of appeals in these and other cases have created a conflict among the circuits, petitioners principally contend (80-1822 Pet. 8-16; 80-2010 Pet. 15; 80-2020 Pet. 5-7) that it was reversible error to call to the stand the poker dealers who were expected to invoke their Fifth Amendment privilege against compelled self-incrimination. However, this Court has recently declined to review an identical claim concerning the decisions of the court below. See *Wooten* v. *United States*, cert. denied, No. 79-1580 (Oct. 6, 1980). For the reasons stated in our brief in opposition in *Wooten*,[5] further review of the present case is also unwarranted.

Here, the challenged events neither "added critical weight to the prosecution's case" nor constituted "prosecutorial misconduct * * * [based on] a conscious and flagrant attempt to build its case out of inferences arising from [the] use of the testimonial privilege." *Namet* v. *United States*, 373 U.S. 179, 186-187 (1963). See also *Douglas* v. *Alabama*, 380 U.S. 415, 420 (1965). The government introduced ample evidence in a lengthy trial to demonstrate petitioners' guilt, including testimony from players in the poker games and tape recordings of petitioner Thornberry's conversations with an FBI informant (Pet. App. 4a-5a). Moreover, as the district court recognized (*id.* at 19a, 23a), the failure to call the dealers as witnesses might have left doubts in the minds of the jurors and unfairly detracted from the government's case. Finally, the district court

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[5]A copy of the *Wooten* opposition is being sent to counsel for petitioners.

immediately gave and subsequently re-emphasized a cautionary jury instruction that a witnesses's assertion of his Fifth Amendment privilege "should not in any way raise any inference of guilt or innocence pertaining to any defendant in this particular case" (*id.* at 30a). See *Namet* v. *United States, supra*, 373 U.S. at 187. In these circumstances, balancing "the factfinder's need to operate with as much relevant information as possible" and the "prejudice which may result to a defendant from inferences which may be drawn if a witness takes the fifth amendment" (*United States* v. *Vandetti*, 623 F. 2d 1144, 1149 (6th Cir. 1980)), the court of appeals correctly concluded (Pet. App. 5a-6a) that no reversible error had occurred.[6]

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[6]Petitioner Thornberry's citation to cases in other circuits (80-1822 Pet. 11) does not establish the existence of a conflict. A majority of these cases simply hold that the district court did not abuse its discretion in refusing to permit a defendant to call a co-defendant or other witness associated with the crime for the purpose of asserting the witness's privilege against self-incrimination before the jury. See *Bowles* v. *United States*, 439 F. 2d 536 (D.C. Cir. 1970) (en banc), cert. denied, 401 U.S. 995 (1971); *United States* v. *Reese*, 561 F. 2d 894 (D.C. Cir. 1977); *United States* v. *Johnson*, 488 F. 2d 1206 (1st Cir. 1973); *United States* v. *Maloney*, 262 F. 2d 535 (2d Cir. 1959); *United States* v. *Harris*, 542 F. 2d 1283 (7th Cir. 1976); *United States* v. *Roberts*, 503 F. 2d 598 (9th Cir. 1974); *United States* v. *Martin*, 526 F. 2d 485 (10th Cir. 1975). In another group of cases, it was found that the trial court committed reversible error because the defendant was clearly and unjustifiably prejudiced by the witness's assertion of the Fifth Amendment privilege in the presence of the jury, the prosecutor had engaged in misconduct, or the trial court failed to give cautionary instructions to the jury. See *Fletcher* v. *United States*, 332 F. 2d 724 (D.C. Cir. 1964); *San Fratello* v. *United States*, 340 F. 2d 560 (5th Cir. 1965); *United States* v. *Ritz*, 548 F. 2d 510 (5th Cir. 1977); *United States* v. *King*, 461 F. 2d 53 (8th Cir. 1972); *United States* v. *Coppola*, 479 F. 2d 1153 (10th Cir. 1973); see also *United States* v. *Tucker*, 267 F. 2d 212, 215 (3d Cir. 1959). And in *United States* v. *Beechum*, 582 F. 2d 898 (5th Cir. 1978), cert. denied, 440 U.S. 920 (1979), the court merely held that the defendant waived his privilege by taking the stand and that the district court therefore did not err in allowing the government to ask questions that elicited an invocation of the Fifth Amendment.

Petitioners also contend (80-1822 Pet. 13-16; 80-2010 Pet. 15; 80-2020 Pet. 6-7) that the prosecutor's closing argument drew improper inferences from the dealers' refusal to testify as government witnesses. The record belies this contention. Indeed, in the course of explaining that the government bore the burden under 18 U.S.C. 1511 of proving that five or more persons were involved in the illegal gambling business, the prosecutor expressly stated (Pet. App. 35a; emphasis added):

> You get to the dealers. Now, the United States brought these dealers in here and put them on the stand. *But we didn't get anything out of them. And you are not to infer, you know, that that is anything against the defendants.* But we wanted to put all the people on that we could that were at that game and obviously the dealers were at that game, to have them tell you what was going on.

In light of the nature and context of these remarks and the absence of any objection to them by defense counsel, the court of appeals correctly held (*id.* at 6a) that the prosecutor's closing argument did not amount to reversible error.

2. Petitioner Thornberry next contends (80-1822 Supp. Pet. 3-9) that the Fifth and Sixth Amendments were violated by the introduction into evidence of tape recordings of his statements to a government informant. These claims are without merit.

Some of the conversations in question were recorded by the undercover informant after Thornberry had been informed of his rights under *Miranda* v. *Arizona*, 384 U.S. 436 (1966), and had declined to talk with FBI agents. At that time, however, Thornberry had been neither arrested nor detained in any way. Because Thornberry was not "in[] custody or otherwise deprived of his freedom of action in any significant way" (384 U.S. at 444), *Miranda* has no

application here. See, *e.g.*, *Edwards* v. *Arizona*, No. 79-5269 (May 18, 1981), slip op. 4-5, 8-9; *Oregon* v. *Mathiason*, 429 U.S. 492, 494-495 (1977); *Beckwith* v. *United States*, 425 U.S. 341, 346 (1976). Accordingly, Thornberry's statements to the informant were not obtained in violation of the Fifth Amendment. See *Hoffa* v. *United States*, 385 U.S. 293, 303-304 (1966).

Similarly, Thornberry's Sixth Amendment right to counsel was not violated. By its terms the Sixth Amendment applies to "criminal prosecutions," and the "clear rule of [the Sixth Amendment] is that once adversary proceedings have commenced against an individual, he has a right to legal representation when the government interrogates him." *Brewer* v. *Williams*, 430 U.S. 387, 401 (1977). See also *United States* v. *Henry*, 447 U.S. 264 (1980); *Massiah* v. *United States*, 377 U.S. 201 (1964). Here, "judicial proceedings ha[d not] been initiated against [Thornberry]—'whether by way of formal charge, preliminary hearing, indictment, information, or arraignment.' " *Brewer* v. *Williams, supra*, 430 U.S. at 398, quoting *Kirby* v. *Illinois*, 406 U.S. 682, 689 (1972). The government did no more than "use[] [an] undercover agent[] to obtain incriminating statements from [a] person[] not in custody but suspected of criminal activity prior to the time charges are filed" (*United States* v. *Henry, supra*, 447 U.S. at 272), and this investigatory procedure is not barred by the Sixth Amendment. See *Hoffa* v. *United States, supra*, 385 U.S. at 309-310.[7]

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[7]Petitioner Thornberry suggests (Supp. Pet. 7) that FBI agents "had focused on him as an accused in their investigation of criminal activity." Insofar as this suggestion is pertinent at all, we note that the original indictment in this case, returned subsequent to the events of which Thornberry complains, did not name Thornberry as a defendant. Petitioner was first included as a defendant in the superseding indictment filed three weeks later (C.A. App. 575).

3. Petitioners Noel and Donnelly further claim (80-2010 Pet. 4-14) that the jury was unconstitutionally impaneled because it was not chosen from a reasonably representative cross-section of eligible jurors in the Eastern District of Kentucky. In particular, they complain that the jury was disproportionately rural in composition because it was selected from people residing in and around London, Kentucky, rather than from the District as a whole.

Although the Eastern District of Kentucky is not subdivided into judicial divisions, Congress has authorized federal trials to be held in eight cities within the District. See 28 U.S.C. 97. By judicial order, the juries serving in each city are drawn from the counties closest to that city.

Petitioners were originally tried in Covington, Kentucky, but a mistrial was "declared on motion of the defendants due to a communication made to one of the jurors in Covington" (C.A. App. 137; see also *id.* at 120-121). Because of this incident and the publicity surrounding the trial in Covington,[8] the district court initially ordered that the retrial be held in Frankfort, Kentucky (C.A. App. 121). However, the court later learned that "due to the racing season in Lexington, lodging facilities are practically impossible to find in the Lexington-Frankfort area" at the time the trial was scheduled (C.A. App. 137). Moreover, the court determined that defense counsel were unavailable during alternate trial dates (C.A. App. 137, 138). Finally, the court considered the other cities in the District available for trial and concluded that London was "the most convenient to the parties and witnesses" (C.A. App. 138). Accordingly, "in consideration of the requirements of the Speedy Trial Act * * * [and] with due regard to the convenience of

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[8]Petitioner Thornberry had previously moved for a change in the location of the trial on the ground of prejudicial publicity (see, *e.g.*, C.A. App. 123-124, 138).

the witnesses and defendants in this matter" (C.A. App. 137), the court ordered that the retrial be conducted in London.

On the morning of trial in London, petitioners moved to strike the jury venire on the ground that it was composed only of jurors residing in the counties around London and therefore did not constitute a fair cross-section of the District. Petitioners asserted that these counties were predominately rural and agricultural, in contrast to the principally urban counties surrounding Covington (C.A. App. 182, 185).

The district court denied the motion for two reasons. First, the court held "that the motion is not timely made. If it had been made earlier, we could have considered whether a jury drawn from the district-at-large would be appropriate" (C.A. App. 188). Second, the court concluded that there was sufficient "justifi[cation] in assigning [the] case within the district at some other location [than Covington]" and that "the reason for the jurors coming from these particular counties [around London] is in line with the fact that jurors may be excused on finding that there is an extreme inconvenience or hardship if the juror resides at a distance [of] more than 75 miles from the place of holding court" (C.A. App. 188-189).

Against this background, further review of petitioners' claim is not warranted. As the district court expressly found, petitioners' challenge to the composition of the jury panel drawn from the London area was untimely. Petitioners do not contest this holding, which fully disposes of their contention.

In any event, petitioners' argument is substantively unavailing and does not warrant further review.[9] For the

[9]We assume arguendo, for purposes of this opposition, that the urban or rural attributes of potential jurors constitute a distinct and identifiable characteristic that must be fairly represented on the jury panel, and

reasons stated in the opinion of the court of appeals and in our brief in opposition (at pages 3-5 & n.3) in *United States* v. *Young*, 618 F. 2d 1281, 1287-1288 (8th Cir. 1980), cert. denied, No. 79-2076 (Oct. 6, 1980),[10] the Sixth Amendment requires only that the jury panel represent a fair cross-section of the "community" from which the panel is drawn, and it does not prohibit a panel to be selected from one division or area of a judicial district. Especially in the circumstances of this case, where persons from remote counties would have been entitled (see C.A. App. 188-189) to a hardship exemption from serving on a jury in London pursuant to the Jury Selection and Service Act of 1968 (see 28 U.S.C. (1863(b)(5) and explanatory note),[11] a jury panel drawn from the London area was not unconstitutional.

4. Lastly, petitioner Seiter argues (80-2020 Pet. 8; see also 80-2010 Pet. 15) that under the intervening decision of this Court in *Trammel* v. *United States*, 445 U.S. 40 (1980), the district court erred in holding that the privilege for confidential marital communications precluded the defense from seeking to impeach a government witness concerning letters the witness had written to his wife about a possible "deal" with the government.

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that petitioners proffered sufficient facts to the district court to raise a colorable claim that the venire was not a representative cross-section. Both of these propositions are subject to doubt, however. For example, the jury area for Covington, like that for London, includes a number of rural counties. Moreover, petitioners have cited no authority to support their view that the urban residents of a locality are " 'distinctive groups' " that must be reasonably represented. *Duren* v. *Missouri*, 439 U.S. 357, 364 (1979), quoting *Taylor* v. *Louisiana*, 419 U.S. 522, 538 (1975).

[10]A copy of our opposition in *Young* is being provided to counsel for petitioners.

[11]The Court has previously declined to review claims that such exemptions violate the Sixth Amendment. See, *e.g.*, *United States* v. *Lewis*, 504 F. 2d 92 (6th Cir. 1974), cert. denied, 421 U.S. 975 (1975); see also *United States* v. *Fernandez*, 480 F. 2d 726, 730-735 (2d Cir. 1973).

The district court's ruling was correct and accords with this Court's decisions recognizing a privilege for confidential marital communications. See *Blau* v. *United States*, 340 U.S. 332 (1951); *Wolfle* v. *United States*, 291 U.S. 7 (1934). Nor does *Trammel* v. *United States* suggest a different result. *Trammel* involved the "privilege against adverse spousal testimony" (445 U.S. at 41, 44) rather than the distinct "confidential marital communications privilege" (*id.* at 45 n.5) at issue here, and the Court specifically noted that its "holding today does not disturb *Wolfle* and *Blau*" (*ibid.*).

Moreover, petitioner was not prejudiced by the district court's ruling. The government witness was extensively cross-examined about any "deal" he might have made in exchange for his testimony, and petitioner has never contended that the letters (which were produced to the defense, see 80-2020 Pet. 8) were inconsistent with the witness's statements at trial. Thus, petitioner was allowed adequate latitude to impeach the witness on the basis of interest or bias, and petitioner's substantive rights were not infringed by the court's determination that the subject of the letters between the witness and his wife was within the marital privilege.

CONCLUSION

The petitions for a writ of certiorari should be denied.

Respectfully submitted.

REX E. LEE
Solicitor General

D. LOWELL JENSEN
Assistant Attorney General

MARGARET I. MILLER
Attorney

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